Supreme Court, U.S.
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No. (1)

In The

Supreme Court of the United States

RICOH ELECTRONICS, INC.,

Petitioner,

v.

JAMES HALUCK and MICHAEL LITTON,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the California Court of Appeal erred in concluding that a subsidiary may not assert the Article VIII(1) defense of its foreign parent under the U.S.-Japan Friendship, Commerce, and Navigation Treaty to Respondents' claims of employment discrimination, where the parent dictated the placement of its employees in key management and technical positions at the subsidiary, and thereby violated the Supremacy Clause, Article VI, Clause 2 of the United States Constitution which provides that the "Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land. . . ."

2. Whether the California Court of Appeal erred in concluding that a subsidiary may not assert the Article VIII(1) defense of its foreign parent under the U.S.-Japan Friendship, Commerce, and Navigation Treaty to Respondents' claims of employment discrimination, where the parent dictated the placement of its employees in key management and technical positions at the subsidiary, and thereby violated Article II, Section 2, Clause 2 of the United States Constitution which provides that the President "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties provided two thirds of the Senator's present concur. . . . "

QUESTIONS PRESENTED FOR REVIEW – Continued

3. Whether the California Court of Appeal erred in concluding that a subsidiary may not assert the Article VIII(1) defense of its foreign parent under the U.S.-Japan Friendship, Commerce, and Navigation Treaty to Respondents' claims of employment discrimination, where the parent dictated the placement of its employees in key management and technical positions at the subsidiary, and thereby violated Article I, Section 8, Clause 3 of the United States Constitution which provides that the Congress shall have the power to "regulate commerce with foreign nations, and among the several states. . . ."

4. Whether a subsidiary of a foreign corporation has third party standing to invoke the rights of its parent under Article VIII(1) of the U.S.-Japan Friendship, Navigation and Commerce Treaty to a claim of employment discrimination where the parent dictated the placement of its employees in key management and technical positions at the subsidiary.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

* Ricoh Electronics, Inc., a California corporation;
* Larry Vaughn, a resident of the State of Georgia;
* Houssam El Jurdi, a citizen of the United States;
* Yoshihiro Nomura, a citizen of Japan;
* Haruo Uesaka, a resident of the State of Georgia;
* Yoji Ide, a citizen of Japan;
* Yasuaki Muramatsu, a citizen of Japan;
* Michael A. Litton, an individual residing in California; and
* James Haluck, an individual residing in California.

CORPORATE DISCLOSURE STATEMENT

Ricoh Electronics, Inc. ("REI") is a wholly owned subsidiary of Ricoh Americas Corporation, Inc., a corporation organized and existing under the laws of the State of New Jersey, and which is a wholly owned subsidiary of Ricoh Company, Ltd. ("Ricoh-Japan"), a corporation organized and existing under the laws of Japan.

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OPINIONS BELOW

The August 29, 2007 opinion/decision of the Supreme Court of California, which is not reported, denying review of the Petition for Review filed by Petitioner REI is not reported and is printed in the Appendix at App. 49.

The June 1, 2007 opinion of the California Court of Appeal, Fourth Appellate District, Division 3 on Petitioner's cross-appeal, affirming the decision of the trial court, is reported at *Haluck v. Ricoh Electronics, Inc.*, 151 Cal.App.4th 994, 1010 (2007) and is reprinted at App. 1-25.

The November 8, 2004 order of the Superior (trial) Court of the State of California, denying Petitioner's motions for summary judgment, or in the alternative, motions for summary adjudication invoking the Article VIII(1) defense of the U.S.-Japan Friendship, Commerce, and Navigation Treaty, is not reported and is printed at App. 28-48.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This Court has jurisdiction to review by writ of certiorari any "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . .

or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." 28 U.S.C. § 1257(a).

The judgment below is final for purposes of this Court's certiorari jurisdiction. The highest court of the state, the Supreme Court of the State of California, has denied review of the decision of the Court of Appeal which held that Petitioner may not assert the federal treaty rights of its foreign parent, in violation of the Constitutional provisions involved in this Petition and contrary to numerous federal district and appellate court decisions on the subject. As a result, the case is now final and ripe for review by this Court.

Although the Court of Appeal also reversed the judgment on grounds of judicial misconduct and ordered a new trial before a different judge, there will be no retrial or any further proceedings below concerning the federal treaty issues which have been finally and adversely decided against Petitioner by way of summary adjudication, in derogation of federal law and the U.S. Constitution. As this Court has long recognized, "[t]here have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing." *Republic Natural Gas Co. v. Oklahoma,* 334 U.S. 62, 68 (1948). Petitioner faces irreparable harm from the order of summary adjudication and

the Court of Appeal and Supreme Court decisions affirming that order because Petitioner's right to invoke protection under the U.S.-Japan FCN Treaty has been declared null and void by the California state courts.

Review is proper because "the federal issue has been finally decided in the state courts with further proceedings pending . . . " and "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, at 482-483 (1975). The Superior Court for the State of California, as affirmed by the California Court of Appeal and the California Supreme Court, have all squarely and *finally* rejected Petitioner's right to assert the Article VIII(1) defense of its parent under the U.S.-Japan FCN Treaty to the employment discrimination claims of Respondents where the foreign parent dictated the alleged discriminatory conduct. Accordingly, the federal issue has been conclusively resolved, and there will be no further state court proceedings to finalize or crystallize the court's disposition of the federal questions involving the Friendship Treaty with Japan, a Treaty negotiated by the President "with the Advice and Consent of the Senate." Article III, Section 2, Clause 3, United States Constitution.

Reversal of the court below on any of the federal questions presented in this case "would be preclusive

of any further litigation on the relevant cause of action" (420 U.S. at 482-83) because the successful assertion of the Treaty defense by Petitioner would be a complete defense to the employment discrimination claims made against REI and obviate the need for any further trial court proceedings in the state courts.

Moreover, if the reported decision is left to stand, "the state-court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 483. The federal policy that is being seriously eroded here by the erroneous decision of the California courts is more than just policy: it is the Supreme Law of the Land. The President and the Senate are charged with the negotiation and execution and approval of treaties with foreign governments. *See* Article II, Clause 2, U.S. Constitution. For the California courts to directly and unequivocally disregard such constitutional mandates clearly interferes with the conduct of foreign relations and commerce with other nations delegated to the Congress and the President. *Id.*; Article I, Section 8, Clause 3, U.S. Constitution.

Federal treaties are assured a status equal with other constitutional provisions. *See* Supremacy Clause, Art. VI, Clause 2, U.S. Const. Accordingly, *Cox* and related cases warrant review of "the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." 420 U.S. at 482-83; Accord *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174, at 178-179 (1988).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clause 3 of the Constitution of the United States of America provides in pertinent part:

> [That Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States and among the Indian tribes.

Article II, Section 2, Clause 2 of the Constitution of the United States of America provides in pertinent part:

> [The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provide ⅔ of the Senators present concur. . . .

Article VI, Clause 3 of the Constitution of the United State of America provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT OF THE CASE

I. Introduction

Respondents, James Haluck and Michael Litton, alleged in their Complaint that Petitioner, REI, intentionally discriminated against them on the basis of "national origin and race" in violation of the Fair Employment and Housing Act (California Government Code section 12940), when Ricoh-Japan placed its own employees, Japanese nationals, on a temporary basis in key management and technical positions at REI.

REI is a domestic subsidiary of Ricoh-Japan, a Japanese corporation, and asserted the defense arising out of the United States-Japanese Friendship, Commerce and Navigation Treaty of 1953 (FCN Treaty), particularly Article VIII(1), which provides that "companies of either Party [to the treaty] shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice*." Apr. 2, 1953, 4 U.S.T. 2063, 2370, T.I.A.S. No. 2863 (1953) (emphasis added); App. 59. Article VIII was included among the treaty provisions "for the limited purpose of securing to foreign investors the freedom to place their own citizens in key management positions, thus facilitating their operational success in the host country." *MacNamara v. Korean Airlines,* 863 F.2d 1135, 1144-45 (3d Cir. 1988). The defense is particularly appropriate here because Ricoh-Japan rotated its uniquely qualified

executive and technical employees (Japanese nationals) who were instrumental in developing new technologies at Ricoh-Japan to its subsidiaries, including REI, for the very purpose of ensuring the integrity and quality of its technological and manufacturing innovations in the United States.

Unfortunately, the California Court of Appeal rejected Petitioner's assertion of the Article VIII(1) defense as a matter of law. By its decision denying review, the California Supreme Court openly declared its repugnance to fundamental federal treaty rights protected by the Supremacy Clause of the United States Constitution. The California Supreme Court allowed the reported decision of the California Court of Appeal of June 1, 2007 to stand, which summarily rejected all federal case law to the contrary and erroneously concluded that the Article VIII(1) defense of the U.S.-Japan FCN Treaty may not be invoked by a domestically incorporated subsidiary of a Japanese corporation even where there the parent had dictated the alleged discriminatory employment conduct. *Haluck v. Ricoh Electronics, Inc.*, 151 Cal.App.4th 994, at 1010 (2007); App. 25. In so ruling, the Court flatly rejected federal precedent and relied on one California case to the contrary, thus affirming the trial court's refusal to recognize fundamental constitutional interests provided by the Supremacy Clause and Article I and Article II of the United States Constitution.

Denial of fundamental constitutional rights concerning a federal treaty protected by the Supremacy Clause is presumed to be irreparable harm and a Writ of Certiorari from this Honorable Court to the California Supreme Court is absolutely essential under these circumstances. Requiring Petitioner to stand trial to defend itself against claims of discrimination is an affront to the guarantees of the U.S.-Japan FCN Treaty. Based on the "*of their choice*" provision of Article VIII(1) and the intent to facilitate success in the host country, "discrimination in favor of foreign executives *given a special status by virtue of a treaty* and its implementing regulations is not equivalent to discrimination on the basis of national origin or race." *Fortino v. Quasar Co.*, 950 F.2d 389, 392 (7th Cir. 1991) (emphasis added).

Review by this Court is required to settle an issue of widespread importance which it has left open since its 1982 decision in *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 189 (1982), where this Court held that once a Japanese corporation incorporated a U.S. domestic subsidiary, the subsidiary was technically an American corporation and thus unable to assert rights under the U.S.-Japan FCN Treaty in their own right. There was, however, no claim in *Sumitomo* that the parent had dictated the personnel decisions and this Court specifically stated that it expressed "no view as to whether [a U.S. subsidiary] may assert any Article VIII(1) rights of its parent," thus leaving open the question. 457

U.S. at 190 n.19 [construing U.S.-Japan FCN Treaty, art. XXII(3)]. The time has come for the highest court of the land to now resolve that question.

Since *Sumitomo*, the Third, Fifth, and Seventh Circuit Courts of Appeals, as well as federal district courts, have relied on footnote 19 and concluded that, in furtherance of the spirit and purpose of the FCN treaties, where the parent dictated the subsidiary's discriminatory conduct, the subsidiary may assert the parent's treaty rights as a defense "to the extent necessary to prevent the treaty from being set at naught." *Fortino v. Quasar Co., supra*, 950 F.2d at 393. Otherwise, a judgment that forbids the subsidiary from giving preferential treatment to the expatriate executives that its parent sends would have the same effect on the parent as it would have if it ran directly against the parent. *Id. See also Bennett v. Total Minatome Corp.*, 138 F.3d 1053 (5th Cir. 1998); *Papaila v. Uniden America Corp.*, 51 F.3d 54, 55 (5th Cir. 1995); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1401, 1402 (7th Cir. 1997); *Santerre v. AGIP Petroleum, Inc.*, 45 F.Supp.2d 558 (D.C. Texas 1999).

Unfortunately, the California Court of Appeal rejected these well-reasoned authorities and the intent and purpose of the FCN treaties, when it held that, as a matter of law, a subsidiary may not assert the third party rights of its parent under the Treaty. In doing so, the court relied on the one California case

on the subject which conflicts with these federal authorities, *Kirmse v. Hotel Nikko,* 51 Cal.App.4th 311 (1996), stating:

> In a well-reasoned discussion, *Kirmse* found *Fortino* unpersuasive and rejected it. (citation) We agree with its conclusions and see no need to reiterate that discussion. Likewise, none of the other federal cases defendants cite dissuades us from our conclusion the treaty does not protect defendant Ricoh. *Haluck v. Ricoh Electronics, Inc.,* 151 Cal.App.4th 994, at 1010 (2007); App. 25.

The decision conflicts with the numerous federal court decisions and violates the Supremacy Clause of the United States and Articles I and II of the U.S. Constitution, pertinent to the U.S.-Japan FCN Treaty. "[FCN] treaties are the 'supreme law of the land' and supersede inconsistent state law." *Spiess v. C. Itoh & Co. (America), Inc.*, 643 F.2d 353, 356 (5th Cir. 1981), vacated and remanded on other grounds, 457 U.S. 1128 (1982). The right to place key Japanese personnel "*of their choice*" at a U.S. subsidiary to ensure the company's success in the host country, without fear of discrimination complaints as guaranteed by the FCN Treaty, is a matter of international sovereignty. Interference with this protected right threatens to undermine the Supreme Law of the United States.

Review by this Honorable Court of the wrongful denial of REI's invocation of the parent's Article VIII(1) defense of the FCN Treaty is essential to

secure uniformity of decision and settle the issue of widespread importance of whether domestic subsidiaries of foreign corporations may assert the third party treaty rights of their parent, when the parent dictates the placement of its key technical and managerial personnel with the domestic subsidiary, as expressly allowed by the FCN treaties.

II. Statement of Facts and Procedural History

In 1973, Petitioner, Ricoh Electronics, Inc. ("REI") was organized as a wholly owned subsidiary corporation of Ricoh Company, Ltd. ("Ricoh-Japan"), a Japanese corporation organized and operating under the laws of Japan.[1] Based in Tustin, California and Lawrenceville, Georgia, REI is Ricoh-Japan's manufacturing subsidiary in the U.S. responsible for the production of toner and thermal media, plain-paper copier, and printed circuit board technology. Declaration of Yoshihiro Nomura filed May 28, 2004, as

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[1] REI was subsequently reorganized as a wholly owned (100%) subsidiary of Ricoh Corporation ("Ricoh-New Jersey"), organized and operating in the State of New Jersey, which in turn is a wholly owned subsidiary (100%) of Ricoh Company, Ltd. ("Ricoh-Japan"). Ricoh-New Jersey was incorporated as the sales component of Ricoh-Japan's U.S. business, while REI was incorporated as Ricoh-Japan's manufacturing arm. REI represents a small part of the worldwide operation of Ricoh-Japan, which consists of 376 subsidiaries and 28 affiliates that develop, produce, market, sell, and recycle office equipment, including copiers and printers, information equipment, optical devices. Nomura Declaration, ¶¶ 2-3.

Exhibit 2 to Joint Defendants' Notice of Lodgment of Evidence Submitted in Support of Motions for Summary Judgment, or in the alternative, Summary Adjudication of Claims (hereafter "Nomura Decl.").

Ricoh-Japan conducts research and development of future technologies and production processes and applies those technologies to the development and manufacture of cutting-edge equipment, a portion of which it exports to REI for manufacture and distribution to local customers. Nomura Decl., ¶ 4, To replicate and ensure the integrity of these technological and manufacturing innovations and the quality of their manufacture, Ricoh-Japan rotates executive and technical employees who have been instrumental in developing the new technologies at Ricoh-Japan throughout its subsidiaries. Nomura Decl. ¶ 5. The rotation of Japanese expatriate executives into the corporate hierarchy permits REI to utilize and capitalize upon the unique knowledge and experience these individuals from Ricoh-Japan have with newly developed technology. Nomura Decl. ¶ 7; Ricoh-Japan temporarily assigns its uniquely qualified personnel at REI to fill those needs. Nomura Decl., ¶ 6. The appropriate individuals at Ricoh-Japan evaluate REI's identified needs and determines who, from among its own managerial or technical staff in Japan, might appropriately fill the void at REI. Nomura Decl., ¶ 6.

Because virtually all of Ricoh-Japan's managerial and technical staff are Japanese nationals, the uniquely qualified personnel that Ricoh-Japan assigns to REI

have been Japanese. Because they are *assigned to REI on a temporary basis*,[2] and *remain employed by Ricoh-Japan*, they are evaluated in accordance with the system in place at the parent company (Nomura Decl., ¶¶ 8-9), *which sets their salaries* (Nomura Decl., ¶ 9) and *maintains their retirement benefits and life insurance policies*. Nomura Decl., ¶ 9.

On August 12, 2003, James Haluck and Michael Litton ("Respondents"), employees of REI, filed a Complaint against REI and a number of key executives and managers of the Company, alleging that REI intentionally discriminated against them on the basis of "national origin and race" in violation of the Fair Employment and Housing Act (California Government Code section 12940), when Ricoh-Japan placed

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[2] The particular need as identified by REI dictates what type of visa application REI makes to the Bureau of Citizenship and Immigration Services ("BCIS"). Some expatriates have entered the U.S. on E-2, or treaty investor, visas, which provide non-immigrant status for a national of any country with which an appropriate treaty of navigation and commerce exists. *See* Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(15)(E). Other individuals have entered the U.S. for assignment at REI on L-1A or L-1B visas, which provide non-immigrant status for multi-national executives and managers or employees with specialized knowledge of the company's products, processes, or procedures. *See* INA, 8 U.S.C. § 1101(a)(15)(L). The government's decision to grant entry of an individual pursuant to one of these visa categories is strong evidence of that individual's executive, managerial, or specialized knowledge status for purposes of Article VIII(1). *MacNamara v. Korean Airlines*, 863 F.2d 1135, 1141-1142 (3d Cir. 1988).

Japanese nationals on a temporary basis in key management and technical positions at REI.

Petitioner asserted the Article VIII(1) FCN Treaty defense of its parent corporation, Ricoh-Japan, in its twentieth affirmative defense of the Answer to the Complaint filed on September 17, 2003.

On May 28, 2004, Petitioner moved for summary judgment, or in the alternative, summary adjudication of issues on Respondents' claims for discrimination on grounds that, *inter alia,* these discrimination charges were barred by Article VIII(1) of FCN Treaty. *See Article VIII(1) of U.S.-Japan FCN Treaty* attached hereto as App. 50-86, at 59.

On September 29, 2004, the Superior Court issued its tentative ruling denying REI's motions for summary judgment, or in the alternative, summary adjudication as to Respondents' claims for discrimination on the basis of race and national origin, stating that it disagreed with the federal case law and any interpretation of the Treaty so far as Petitioner Ricoh was concerned. The court further declared that *Kirmse v. Hotel Nikko,* 51 Cal.App.4th 311, 321 (1996), as a statement of California law, controlled and supported the trial court's denial of REI's invocation of the U.S.-Japan Treaty. In its final Order issued November 8, 2004, the court, stated:

> The Court denies Defendant's Motion, *applies California law, and finds that REI cannot invoke the treaty.* App. 30; emphasis added.

In doing so, the court, ignored the rulings of the Third, Fifth and Seventh Circuit Courts of Appeals, which have recognized the right of a subsidiary of a Japanese corporation to invoke the Article VIII(1) defense under the FCN Treaty under circumstances as here. *See MacNamara v. Korean Airlines*, 863 F.2d 1135, 1144-45 (3rd Cir. 1988); *Fortino v. Quasar Co.* 950 F.2d 389, 392 (7th Cir. 1991); *Papaila v. Uniden America Corp.*, 51 F.3d 54, 55 (5th Cir. 1995); and *Bennett v. Total Minatome Corp.*, 138 F.3d 1053 (5th Cir. 1998)

Petitioner immediately sought discretionary review by the California Supreme Court and the U.S. Supreme Court, both of which were denied.

After a jury trial, Respondents, Haluck and Litton, appealed the Judgment and on July 1, 2005, Petitioner filed a protective cross-appeal of the trial court's order of November 8, 2004, denying summary judgment and summary adjudication on the issue of whether the U.S.-Japan Friendship Treaty barred Respondents' claims as a matter of law.

On June 1, 2007, the Court of Appeal reversed the judgment of the trial court on grounds of judicial misconduct and remanded the case to be assigned to a different judge. As to Petitioner's cross-appeal, the court affirmed the ruling of the trial court, holding that the treaty does not apply to a domestically incorporated subsidiary of a Japanese corporation. In doing so, the court expressly rejected federal case law and relied on the one California case on the subject,

Kirmse, supra, 51 Cal.App.4th 311, 317, concluding that "the treaty does not protect defendant Ricoh." *Haluck v. Ricoh Electronics, Inc., supra,* 151 Cal.App.4th at 1010. App. 25.

On July 10, 2007, Petitioner timely filed a Petition for Review with the California Supreme Court which was denied on August 29, 2007. App. 49.

This Petition for Writ of Certiorari was timely filed. 28 U.S.C. § 2101(c). U.S. Sup. Ct. R. 13(1) and (3).

REASONS FOR GRANTING THE PETITION

I. THERE IS A REASONABLE PROBABILITY THAT AT LEAST FOUR MEMBERS OF THIS COURT WOULD CONCLUDE THAT THIS CASE WARRANTS PLENARY CONSIDERATION

Writ of certiorari should be granted because there is a reasonable probability that four or more Members of this Court would vote to grant *certiorari. Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955).

1. This Court previously granted certiorari to review a closely related case arising out of a similar dispute. *See Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 102 S.Ct. 2374, 72 L.Ed.2d 765 (1982). This case presents Constitutional issues commented upon, but left open, by the *Sumitomo*

decision. *See* 457 U.S. at 189, n.19 ["We also express no view as to whether Sumitomo may assert any Article VIII(1) rights of its parent."]. In the ensuing years, lower federal and state courts have grappled with this precise issue which is now presented in this case and ripe for review. The instant Petition for a Writ of Certiorari presents related questions under Articles I and II of the United States Constitution and the Supremacy Clause of the United States Constitution.

2. This Court's review of the California Court of Appeal's decision is warranted because the Court (1) decided an important federal question in a way that conflicts with decisions of the federal circuit courts of appeals and district courts and decided an important question of federal law that has not been, but should be, settled by this Court. U.S. Sup. Ct. R. 10(b) & (c). The issues presented involve constitutional principles and federal treaty rights, the settlement of which is of widespread importance. As discussed in greater detail below, these important questions concern the Supremacy Clause of the U.S. Constitution, Federal Treaty rights, and conflicting federal and state court cases interpreting these federal treaty rights and constitutional principles. The settlement of these issues is also important because there is conflict of opinion and authority between the federal and state courts of appeals. *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

3. There is a profound national interest in ensuring the stable and consistent conduct of foreign affairs and conduct of foreign commerce. This national interest also includes the promotion of investments by foreign companies in the U.S. economy and the ability of U.S. companies to successfully operate abroad, as stated in these FCN Treaties. *See Art. I of the U.S.-Japan FCN Treaty,* 4 U.S.T. 2063 (1953), App. 52; *Art. II, U.S.-France FCN Treaty,* 11 U.S.T. 2398 (1959); *Art. II, U.S. Korea FCN Treaty,* 8 U.S.T. 2217 (1956).

II. PETITIONER, REI, IS LIKELY TO PREVAIL ON THE MERITS

There is a fair prospect that Petitioner will prevail on the merits in this case.

1. The Alleged Discrimination Against Respondents Is Ricoh-Japan's Temporary Assignment to REI of Japanese Citizens as Executives and Technical Experts as Expressly Allowed by the U.S.-Japan FCN Treaty

In 1953 the United States and Japan signed the Treaty and Protocol Between the United States of America and Japan Regarding Friendship, Commerce and Navigation. 4 U.S.T. 2063, T.I.A.S. No. 2863; App. 50-86. After the Second World War, the United States negotiated Friendship, Commerce and Navigation ("FCN") treaties with over forty-eight nations to

promote overseas investments by U.S. companies in countries recovering from World War II. The treaties guaranteed certain legal protections for U.S. investors abroad and, in return, guaranteed protection to foreign businesses operating in the United States. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 182 (1982) [citing Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229-232 (1956)]. Originally intended to encourage U.S. investments abroad in Japan as it recovered from World War II the U.S.-Japan FCN Treaty also promotes direct investment by Japan in the United States. *Id.* To facilitate seamless management of Japanese companies operating within U.S. boundaries, the U.S.-Japan FCN Treaty recognizes the right of these companies to retain certain classes of employees, such as executives, attorneys or technical experts "of their choice." *See* U.S.-Japan FCN Treaty, Art. VIII.

Specifically, Article VIII(1) of the U.S.-Japan FCN Treaty provides that:

> [n]ationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists *of their choice.* 4 U.S.T. 2063, 2070 (emphasis added). App. 59.

Article VIII was included among the treaty provisions "for the limited purpose of securing to

foreign investors the freedom to place their own citizens in key management positions, thus facilitating their operational success in the host country." *MacNamara v. Korean Airlines,* 863 F.2d 1135, 1144-45 (3d Cir. 1988) [construing Article VIII(1) of the Korean FCN Treaty, which is nearly identical to that of the U.S.-Japan FCN Treaty]. Both countries to the treaty deemed the provision, and its concomitant right to place the signatories' own nationals in managerial, technical, and confidential capacities, "to be critical." *Wickes v. Olympic Airways,* 745 F.2d 363, 367-368 (6th Cir. 1984) (construing Article XII(4) of the Greek FCN Treaty, which contains language similar to that of the Japanese FCN Treaty). Courts generally agree that Article VIII necessarily affords each such company the right to prefer its own citizens to those possessing U.S. citizenship. *Bennett v. Total Minatome Corp.,* 138 F.3d 1053 (5th Cir. 1998) [construing Article VI of the U.S.-French FCN Treaty, which is similar to Article VIII of the U.S.-Japan FCN Treaty]; *Papaila v. Uniden America Corp.,* 51 F.3d 54, 55 (5th Cir. 1995) [construing Article VIII(1) of the U.S.-Japan FCN Treaty]; *MacNamara, supra,* 863 F.2d at 1144. This is true even if the company does so as replacement for or instead of existing company personnel. *Id.* As such, "*discrimination in favor of foreign executives given a special status by virtue of a treaty and its implementing regulations is not equivalent to discrimination on the basis of national origin or race.*" *Fortino v. Quasar Co.,* 950 F.2d 389, 392 (7th Cir. 1991), emphasis added, [construing Article VIII(1) of the U.S.-Japan FCN Treaty].

In reliance on Article VIII(1) of the U.S.-Japan FCN Treaty, Ricoh-Japan assigned on a temporary basis several of its own managers and technical experts to work at REI to implement rapidly evolving technological developments from the parent to REI and ensure the quality and consistency of its products. When the need for highly specialized technical skills arise, REI relies on its parent to temporarily transfer individuals from Japan to the United States, which Ricoh-Japan properly does pursuant to non-immigrant visas specifically designed for such purposes.

Consequently, Respondents' claim that Ricoh-Japan's placement of Japanese citizens in positions at REI constitutes discrimination on the basis of national origin or race simply cannot stand given the provisions of the U.S.-Japan FCN Treaty as interpreted by the federal courts and Ricoh-Japan and REI's reliance thereon. *Fortino, supra,* 950 F.2d at 392.

2. As a Subsidiary of Ricoh-Japan, REI May Invoke the Rights of its Parent Under the U.S.-Japan FCN Treaty

There has been much debate about what entities may properly rely upon the provision outlined in Article VIII as relates to their choice of executives and technical personnel. Indeed, according to the U.S. Supreme Court, once a Japanese corporation incorporated a U.S. domestic subsidiary, the subsidiary was

technically an American corporation and thus unable to assert rights under the U.S.-Japan FCN Treaty in their own right. *Sumitomo Shoji America, Inc. v. Avagliano,* 457 U.S. 176, 189 (1982). There was, however, no claim that the parent had dictated the personnel decisions in *Sumitomo,* and the Court expressed "no view as to whether [a U.S. subsidiary] may assert any Article VIII(1) rights of its parent," thus leaving open the question. 457 U.S. at 190 n.19 [construing U.S.-Japan FCN Treaty, art. XXII(3)].

In the years since *Sumitomo* was decided, numerous federal courts have determined that, in furtherance of the spirit and purpose of the FCN treaties, domestic subsidiaries must be permitted to assert the treaty rights of their parent under limited circumstances, as here. The issue was first squarely addressed by the Seventh Circuit, which concluded that the *subsidiary must be allowed to assert its parent's treaty rights where the parent had dictated the subsidiaries discriminatory conduct to prevent the treaty from being set at naught. Fortino v. Quasar Co.,* 950 F.2d 389, at 393 (7th Cir. 1991). Other federal courts followed suit. *See Bennett v. Total Minatome Corp.*, 138 F.3d 1053 (5th Cir. 1998); *Papaila v. Uniden America Corp.*, 51 F.3d 54, 55 (5th Cir. 1995); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1401, 1402 (7th Cir. 1997); *Santerre v. AGIP Petroleum, Inc.*, 45 F.Supp.2d 558 (D.C. Texas 1999).

This development of the law is consistent with the views of Herman Walker, Jr., Advisor on Commercial Treaties at the State Department, who was

quoted by the U.S. Supreme Court in *Sumitomo* (457 U.S. at 181 n.6), and who first made the suggestion that the FCN Treaty apply to U.S. subsidiaries of foreign parents. *See* Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 Am. J. Comp. L. 229, n.5 at 244 (1956). Mr. Walker stated that application of the FCN Treaty only to branches of the foreign company would not be sufficient protection, because one must consider the fact that investors choose to operate abroad through subsidiaries chartered under the laws of the foreign country. *Id.*

Since *Sumitomo,* this Court has not addressed the propriety and extent of this exception now recognized in the federal appellate courts but rejected by the California Court of Appeal. Review is essential to secure uniformity of decision, to address the constitutional and federal issues presented, and to protect foreign investment in the United States. The recognized commercial treaty policy of protecting and promoting foreign investment in the United States (and reciprocal U.S. investment and business abroad) can be furthered by recognizing a subsidiary's substantive relationship with its parent and allowing it to assert the parent's protected discretion in the hiring and placement of managerial and technical personnel.

3. The California Appellate Court Erred in Rejecting Federal Precedent and Relying on a Conflicting State Court Decision

The federal precedent, discussed above, interpreting federal law, is "persuasive and entitled to great weight." *Etcheverry v. Tri-Ag Serv.,* 22 Cal.4th 316, 320 (2000); *Spellman v. Securities, Annuities & Ins. Svc., Inc.,* 8 Cal.App.4th 452, 459 (1992).

Unfortunately, the California Court of Appeal not only gave this authority no weight, they summarily and expressly rejected the position of the federal courts, relying on the one California decision addressing the issue, *Kirmse v. Hotel Nikko of San Francisco,* 51 Cal.App.4th 311 (1996), which rejected the *Fortino* exception ("Since we reject *Fortino* . . . "; *Id.,* at 321). *Haluck v. Ricoh Electronics, Inc., supra,* 151 Cal.App.4th at 1010; App. 25. In doing so, it relied on the *dissenting* opinion of Justice Reavley in *Spiess v. C. Itoh & Co. (America), Inc.,* 643 F.2d 353 (5th Cir. 1981) and on *Sumitomo. Id.,* at 318. However, neither *Spiess* (which was pre-*Sumitomo*) nor *Sumitomo* decided the right of a subsidiary to assert the *third party rights of its parent* under an FCN Friendship Treaty where the parent had dictated the personnel decisions.

In relying on *Kirmse,* the court also summarily refused to consider the exception left open by the *Sumitomo* court as subsequently carved out and

defined by *Fortino* and its progeny. With little explanation, the Court of Appeal summarily rejected Petitioner's right to assert this defense as a matter of law, stating:

> In a well-reasoned discussion, *Kirmse* found *Fortino* unpersuasive and rejected it. (Citation omitted.) We agree with its conclusions and see no need to reiterate that discussion. Likewise, none of the other federal cases defendants cite dissuades us from our conclusion the treaty does not protect defendants Ricoh. *Haluck v. Ricoh Electronics, Inc., supra,* 151 Cal.App.4th at 1010; App. 25.

In denying review, the California Supreme Court has allowed this erroneous reported decision to stand, in derogation of federal case law, federal treaty rights, and related Constitutional provisions.

4. The Decision of the California Court Violates the Supremacy Clause of the U.S. Constitution as it Conflicts with Federal Treaty Rights

Article I, Section 8, Clause 3 of the Constitution of the United States of America provides in pertinent part:

> [That Congress shall have Power] to regulate Commerce with foreign Nations, and among the several States and among the Indian tribes.

Article II, Section 2, Clause 2 of the Constitution of the United States of America provides in pertinent part:

> [The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provide ⅔ of the Senators present concur. . . .

Article VI, Clause 3 of the Constitution of the United States of America provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The decision of the California Court of Appeal is in conflict with these constitutional provisions and erodes federal policy. The President and the Senate are charged with the negotiation and execution and approval of treaties with foreign governments. *See* Article II, Clause 2, U.S. Const. The court's direct and unequivocal disregard of such constitutional mandates clearly interferes with the conduct of foreign relations and commerce with other nations delegated to the Congress and the President. *Id.* Article I, Section 8, U.S. Const. Moreover, those treaties are assured a status equal with other constitutional provisions, and bind the states pursuant to the

Supremacy Clause. Article VI, Clause 2, U.S. Const.; *Sanchez-Llamas v. Oregon*, 126 S.Ct. 2669, 2680 (2006).

The language of the Supremacy Clause – which directs that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding," – and the decisions of the U.S. Supreme Court confirm that state courts have the coordinate authority and consequent responsibility to enforce the Supreme Law of the Land. *Howlett v. Rose*, 496 U.S. 356, 370 (1990). In doing so, the state courts presumptively have the obligation to apply federal law to a dispute before them and may not deny a federal right in the absence of a valid excuse. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 483-484, n.16 (1983). The Supremacy Clause of the United States Constitution requires the State court to apply and interpret a Federal Treaty consistent with the interpretations applied by the Federal courts. *Miller v. Municipal Court of Los Angeles,* 22 Cal.2d 818, 841 (1943). The State court must enforce the Federal statute irrespective of objections of local policy. *Testa v. Katt,* 330 U.S. 386 (1947).

Federal courts have consistently held that FCN treaties, completely supersede inconsistent state law. *See, e.g., Haustein v. Lynham*, 100 U.S. 483, 489, 25 L.Ed. 628 (1879) (treaty prevailed over conflicting state law in dispute over inheritance rights); *Spiess v. C. Itoh & Co. (America), Inc., supra*, 643 F.2d 353, vacated and remanded on other grounds, 457 U.S.

1128 (1982); *Oregon-Pacific Forest Products Corp. v. Welsh Panel Co.*, 248 F.Supp. 903, 910 (D. Or. 1965) (holding that the FCN Treaty required enforcement of a provision in a contract calling for arbitration in Japan; "a treaty is the supreme law of the land. [Citations omitted.] Even a state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty.").

Here, the court refused to follow these basic constitutional rules. Review by this Court is required to correct the conflict with federal policy and constitutional provisions.

5. REI Has Third Party Standing to Invoke the Federal Treaty Rights of its Parent

This Court has recognized that defendants may have standing to raise the rights of third parties. *See Warth v. Seldin*, 422 U.S. 490, 510 (1975). Such third party standing will depend on (1) the nature of the relationship between the litigant and the third party; (2) the ability of the third party to effectively assert its own rights; and (3) the risk that the rights of the third party will be impaired if third party standing is not permitted. *See Griswold v. Connecticut*, 381 U.S. 479, 481 (1965); *NAACP v. Alabama*, 357 U.S. 449, 458-60 (1958); *Barrows v. Jackson*, 346 U.S. 249, 257 (1953); *see also* Note, Standing to Assert Constitutional Jus Tertii, 88 Harv. L. Rev. 423, 425 (1974)

(outlining the factors that the Supreme Court has considered in allowing third party standing).

There has been a shift of emphasis to the third factor, to examination of the impairment of the third party's rights as the principal test for determining whether to grant standing. Evidence of indirect impairment of third parties' constitutional rights and the "impact of the litigation on the third-party interests" is sufficient to obtain standing. *See Craig v. Boren*, 429 U.S. 190, 192-97 (1976); *Eisenstadt v. Baird*, 405 U.S. 438, 445 (1975). A domestic subsidiary should be able to assert its parent's treaty right to hire and place managerial and technical personnel of its choice under this standard because denying the subsidiary's defense would materially impair the parent's treaty-conferred right to control and manage its investments in the United States. *See* Note, "Subsidiary Assertion of Foreign Parent Corporation Rights under Commercial Treaties to Hire Employees 'Of Their Choice,'" 86 Colum. L. Rev. 139, 168.

More recently, this Court has stated that a litigant "may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, at 629 (1991).

Under either of these standards, as a subsidiary, REI should be allowed third party standing to invoke

the rights of its parent, Ricoh-Japan, under the FCN Treaty. First, Ricoh-Japan has suffered a concrete, redressable injury-in-fact sufficient to have a substantial stake in the outcome of this litigation. *Edmonson,* 500 U.S. at 629; *Powers v. Ohio,* 499 U.S. 399 (1991). Indeed, Ricoh-Japan's future rights to conduct business pursuant to the U.S.-Japan FCN Treaty are inextricably tied to the way in which REI conducts its daily business, especially should such conduct be found to be proscribed by or in conflict with California's anti-discrimination statutes. Thus, Ricoh-Japan has a stake in the outcome of this case. *Id.*

Second, as has been clearly demonstrated, *supra,* REI has a close relation with the third party, Ricoh-Japan, sufficient to permit REI to raise and assert Ricoh-Japan's rights under the U.S.-Japan FCN Treaty. *Edmonson,* 500 U.S. at 629.

Finally, Ricoh-Japan is not a named party in this action and, as such, is unable to assert its own rights under the U.S.-Japan FCN Treaty. Hence, the parent corporation's absence requires REI to protect Ricoh-Japan's interests.

As to the "harm" element, REI has also been required to defend itself in this action as a result of the decision of the parent corporation to mandate the placement of these Japanese expatriates at REI. Based on Ricoh-Japan's mandates, REI has incurred attorneys' fees, costs, and potential liability, which constitutes sufficient harm to assert the third party

rights of its parent. Thus, REI is the only effective and recognizable proponent of Ricoh-Japan's rights under the Treaty to prevent harm to both REI and Ricoh-Japan. Without such third party standing, the FCN treaty would "be set at naught." *Fortino v. Quasar Co., supra,* 950 F.2d at 393.

In sum, the legislative history and judicial interpretations of employer choice provisions in the FCN treaties recognize that foreign companies have an absolute, noncontingent right to hire employees "of their choice" for managerial and technical positions. Although barred by *Sumitomo* from asserting this right directly on their own behalf, subsidiaries of foreign corporations operating in the United States are under numerous federal authorities allowed to assert the right on their parents' behalf when the challenged hiring practices were mandated by the parent and involve positions that are important to the security of the parent company's investment. Imposition of liability, in these situations would undercut the treaty goals protected by "of their choice" provisions. Congress has never indicated an intent to curtail these treaty rights, and the courts should allow subsidiaries to assert the rights on behalf of their parent companies in order to further the commercial treaty goal of encouraging foreign investment. Note, 86 Colum. L. Rev. 139, 167-168.

Unfortunately, as reflected in the Opinions below, the California Court of Appeal rejected these established principles, relying on an anomaly, *Kirmse, supra*, 151 Cal.App.4th at 151. The decision flies in

the face of all federal precedent on the subject and should be, respectfully, corrected by this Court.

III. IN THE ABSENCE OF A WRIT OF CERTIORARI ISSUING FROM THE U.S. SUPREME COURT, U.S.-BASED SUBSIDIARIES OF JAPANESE CORPORATIONS AND U.S. COMPANIES AND EMPLOYEES ABROAD FACE IMMINENT AND IRREPARABLE INJURY

As typically detailed in Article I or Article II of an FCN Treaty, the United States has a vital interest in encouraging foreign companies to invest in the United States economy by establishing subsidiary operations within the United States. Such investments of capital stimulate and promote jobs, economic development and economic growth of various state, local and ultimately the national economy.

Indeed, the concern of Japanese parent corporations concerning the interpretation of the U.S.-Japan FCN Treaty dates back to the briefing accepted by this very Honorable Court in the *Sumitomo* decision. In essence, the concern of all Japanese-based parent corporations with U.S. subsidiaries was articulated in the case of *Spiess v. C. Itoh & Simple Co.*, 643 F.2d 353, 358-361 & n.2 (5th Cir. 1981), where the court declared:

> Considering the Treaty as a whole, the only reasonable interpretation is that Article VIII (1) means exactly what it says: Companies

> have a right to decide which executives and technicians will manage their investment in the host country, without regard to host country laws.

Therefore, to allow the decision of the Court of Appeal to stand would violate the fundamental principal of treaty interpretation that a treaty is to be liberally construed to accomplish its overriding purpose. *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276 (1933); *Nielsen v. Johnson,* 279 U.S. 47 (1929); *Jeofrey v. Riggs*, 133 U.S. 258 (1890).

Indeed, where a treaty admits two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *See Factor, Nielsen, Ossocura v. Seattle*, 265 U.S. 332 (1924). This Court has traditionally construed commercial treaties in an expansive manner, both in determining the parties entitled to claim treaty protection and the means by which those parties exercise their treaty rights. *Kolovret v. Oregon,* 366 U.S. 187 (1961); *Jordon v. Tashiro*, 278 U.S. 123 (1928).

If Japanese corporations cannot operate and control their subsidiaries based in the United States and control the administration of their investments based upon their reasonable expectations derived from a plain reading of the U.S.-Japan FCN Treaty, and in particular, Article VIII(1), the entire economic relationship between United States and Japan will be unequivocally altered and disrupted. It is likely that

Ricoh-Japan as well as other Japanese corporations with U.S. subsidiaries will be forced to reconsider and re-evaluate diminishing their capital investments in the United States economy, if not shutting down operations in the United States or reducing such operations, thereby causing an outsourcing of American jobs to foreign countries. Thus, to allow the decision to stand could well disrupt the economic infrastructure of the United States and potentially create a diplomatic crisis between the United States and Japan.

CONCLUSION

Review by this Honorable Court is respectfully requested due to the extraordinary importance of the outcome of this case to the American public and to the business community, both here and abroad. Federal treaty rights are a matter of federal law and should be properly and uniformly recognized and enforced throughout the country. Review is necessary to resolve the specific question left open by this Court in *Sumitomo* to secure uniformity of decision and settle important questions of law of widespread and institutional importance and to protect the Constitutional

Rights and Treaty rights set forth and guaranteed within the Constitution of the United States.

Respectfully submitted,

Dated: November 21, 2007

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APPENDIX

JAMES HALUCK et al., Plaintiffs and Appellants, v. RICOH ELECTRONICS, INC., et al., Defendants and Appellants.

G035681

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

151 Cal. App. 4th 994; 60 Cal. Rptr. 3d 542; 2007 Cal. App. LEXIS 910; 2007 Cal. Daily Op. Service 6457

June 1, 2007, Filed

COUNSEL: Law Offices of Michelle A. Reinglass, Michelle A. Reinglass; Law offices of Marjorie G. Fuller and Marjorie G. Fuller for Plaintiffs and Appellants.

Callahan & Blaine and Jim P. Mahacek for Defendants and Appellants.

JUDGES: Rylaarsdam, J., with Sills, P. J., and Bedsworth, J., concurring.

OPINION BY: RYLAARSDAM

OPINION

RYLAARSDAM, J. – Plaintiffs James Haluck and Michael Litton appeal from a judgment in favor of defendants Ricoh Electronics, Inc., Larry Vaughn, Haruo Uesaka, Yoji Ide, Yoshihiro Nomura, and Houssam El Jurdi on their complaint for employment discrimination on the ground the trial judge's misconduct so infected the proceedings they were deprived of a fair trial. Defendants filed a protective

cross-appeal, claiming the trial court erred by denying their motions for summary judgment and summary adjudication on the ground the action was barred by a United States treaty with Japan. Defendants also filed a motion for sanctions against plaintiffs and their counsel, claiming the appeal is frivolous.

We conclude the trial judge's conduct was sufficiently egregious and pervasive that a reasonable person could doubt whether the trial was fair and impartial and reverse on that ground. On remand, the case shall be assigned to a different judge. Because we reverse, the motion for sanctions is denied. As to defendants' cross-appeal, the court properly found the treaty did not bar the action and thus we affirm its ruling.

FACTS

Based on the nature of this appeal, few of the underlying facts are relevant. Plaintiffs were employed by defendant Ricoh. They sued Ricoh and certain of its employees for damages for statutory and common law discriminatory employment practices, claiming they were passed over for promotions, and Litton ultimately wrongfully terminated, because they were Caucasian and complained about racial discrimination. After a 30-day-plus trial, the jury returned a defense verdict.

THE MISCONDUCT

We recite only the most egregious instances of the judicial misconduct cited by plaintiffs.

Ricoh sought to introduce a video it used for training or public relations purposes. (Characterization by the trial court.) Plaintiffs' lawyer contended, among other reasons for excluding it, that the video was "prejudicial . . . and it's a marketing piece and has no bearing on the lawsuit." The court announced it would watch the video during the lunch hour and did so together with defense counsel without notifying plaintiffs' lawyer that he would be present or inviting her to join them. It then overruled plaintiffs' objections to admission of the video.

Somewhere midpoint in trial, in overruling one of plaintiffs' objections, the judge held up a hand-lettered sign, apparently prepared by him, stating "overruled." The next day, when the court overruled another of plaintiffs' objections, defendants' attorney presented the judge with a different sign, stating: "Your honor, I want to help you if I may. This is a much nicer version. [¶] The Court: Better than my homemade one. [¶] Ms. Reinglass: Plaintiffs object to Mr. Callahan presenting another 'overruled' sign to the court. The court's sign was adequate enough. [¶] The Court: The court will await receiving a 'sustained' sign from plaintiff[s] so we can split the benefits here. [¶] Ms. Reinglass: How many do I get?"

A week later, when plaintiffs' lawyer objected to a question, the court apparently used Mr. Callahan's

"overruled" sign. "Ms. Reinglass: [I am objecting to a]ny reading of the document not in evidence. [¶] The Court: He's not reading, [he's] asking questions. [¶] Ms. Reinglass: Hopefully he won't read. [¶] The Court: And hopefully he won't keep talking. [¶] Mr. Callahan: Your honor, I didn't get a chance to make that. [¶] The Court: It took too much time to make that sign. [¶] Ms. Reinglass: And there's a sign, and I object to that. [¶] The Court: He is directing it to me. It's lightening things up. And the jury nods."

Midway into the trial, the court stated, "Jeffrey [the clerk], we're going to the soccer style method here. Red card, 50 bucks each. Okay. If I say, red card plaintiff, write it down, 50 bucks. Red card defense, 50 bucks. [¶] We'll keep a running tab. End of trial, we'll collect it from them and we may take you guys [presumably the jury] to lunch at a very nice place. Okay. Court has enough money for now, and that will either *stop the talking* or give you a very nice lunch." (Italics added.)

Over the next 20 pages of transcript, during which plaintiff Litton was being examined, defendants' lawyer raised at least nine objections, six of which were overruled, with no mention of a red card. Then, when plaintiffs' counsel stated she was reading the last portion of a deposition, defendants' counsel stated, "Very good. [¶] . . . [¶] I probably shouldn't say very good. No objection." The court states, "That's an orange card, not a red card."

During the next 12 pages or so in the transcript, defendants' lawyer made three objections, two of which were overruled. As plaintiffs' lawyer continued her examination of Litton, she noted she was almost finished with a section. Defendants' counsel stated "352." The court responded, "351 and a half. [¶] Go ahead." After several questions, defendants' lawyer stated, "351 and three-quarters," to which the court replied, "Overruled. Numbers junky." No red cards were mentioned.

Over the next 10 pages of transcript, defendants' lawyer raised two more objections, one of which was overruled. Defendants then interposed a hearsay objection. The court asked, "We're going to have [the expert witness] testify, right? [¶] Ms. Reinglass: Pardon me? [¶] The Court: We're going to have him testifying, right? [¶] Ms. Reinglass: Yes. [¶] The Court: And [Litton] is testifying to his numbers pretrial and questioned on the complaint and not about experts and discovery, so we'll wait for the expert to tell us what those numbers were and how had he arrived on them. [¶] Sustained. [¶] Ms. Reinglass: May I? [¶] The Court: Red card plaintiff, Jeffrey. [¶] Ms. Reinglass: I was asking. [¶] The Court: 5-0. Next question."

In testifying as to his emotional distress, Litton stated that he felt like he was in a white room without doors or windows that had no boundaries. On cross-examination as to this testimony, the following exchange occurred:

"Mr. Callahan: Q Have you ever heard of The Twilight Zone? [¶] A Yes sir. [¶] Q Goes kind of like this, do do, do do. [¶] Ms. Reinglass: Your Honor, I would just object. This is argument. [¶] The Court: Your objection's on the record, ma'am. [¶] Ms. Reinglass: Also improper argument. [¶] Mr. Callahan: You're traveling through another dimension, a dimension not only of sight and sound, but of mind, a journey into a wondrous land, whose boundaries are that of imagination[;] that's a sign post up ahead, your next stop, The Twilight Zone. Do do, do do. Do do, do do. [¶] The Court: That was terrible. Get to the question, please. [¶] Ms. Reinglass: Noting for the record, counsel was singing The Twilight Zone theme song. [¶] The Court: And how the jurors left it will be reflected on the same record. [¶] By Mr. Callahan: Q Endless white room with no doors or windows. [¶] Is that where you got your idea of this white room theory? [¶] . . . [¶] A From where? [¶] . . . [¶] The Court: Twilight Zone. That's his question. [¶] The Witness: No sir. [¶] Mr. Callahan: Do do, do, do. Do do, do do. [¶] Ms. Reinglass: I request that counsel stop singing. As entertaining as it is for the jury, it's mocking my client and mocking the trial. [¶] By Mr. Callahan: Q Ever heard of The Twilight Zone, the show? [¶] A Yes sir. [¶] The Court: For the record, he hit a few notes of The Twilight Zone theme song which I don't see as mocking. He was off color [*sic*]. [¶] Mr. Callahan: I go through life tone deaf and colorblind. This is tough."

During defense counsel's cross-examination of Litton, he read approximately 30 pages of the deposition of Rhonda Stevenson, a one-time employee of Ricoh. Stevenson was not a defendant and at the time of her deposition no longer worked for Ricoh. She never testified at trial. Litton had complained to her about what he believed was unfair treatment. Litton was asked whether he had read her deposition and then counsel was allowed to read several portions of her testimony and ask Litton if he recalled reading that testimony. For example, "Did you read . . . where [Stevenson] said you were insincere and tried to manipulate both her and [another employee]?" "Do you recall [Stevenson's] testimony that you were a proper candidate for layoff . . . ?" When Litton said he did not recall, the court permitted defendants' lawyer to read Stevenson's testimony to that effect.

During that testimony, plaintiffs' lawyer raised numerous objections. At one point she asked to "have a running objection until I add anything new. [¶] The Court: That would help. Same objection that's been going on all day will be deemed to be made to every question and every answer throughout time. [¶] Ms. Reinglass: There may be some I like. [¶] The Court: With the same ruling. Well, until I die. Same ruling. Okay. [¶] Ms. Reinglass: Just as to Ms. Stevenson's deposition. I'll settle for that for now."

As defendants' counsel continued to cross-examine Litton using that deposition, before one question he stated, "Okay. This one is not good for Mr. Haluck. . . . [¶] Ms. Reinglass: Objection to the characterization

by counsel. Improper argument. [¶] The Court: It's a warning. Just giving the witness a heads up." [¶] What's the question, sir?"

The next day, as defendants' lawyer again began to cross-examine Litton using the deposition, plaintiffs' lawyer objected, to which the court responded: "Overruled. Objection, 187. [¶] Ms. Reinglass: Huh? [¶] The Court: I got a number for all these things. [¶] Mr. Callahan: 187 in the Penal Code, what is that, your honor? [¶] The Court: Murder."

In another instance, when Litton was testifying that he was discriminated against because of his race, his lawyer asked: "And did you feel that it was based upon your race because of comments by [defendant] Nomura?" The court sustained an objection as leading. Counsel then rephrased, asking, "Was there any other reason why you felt that it was based upon your race? [¶] A [D]ue to the comment by [defendant] Nomura." Defendants' attorney stated, "What a surprise," to which the judge remarked, "Aren't they clever. [¶] (Laughter)."

As defendants' counsel was concluding his cross-examination of Litton, the following exchange occurred: "With that, your honor – [¶] Oh, do you [Litton] play poker? [¶] A No, sir. [¶] Q Terrific poker face." Plaintiffs' lawyer objected "to the editorializing by counsel." There was no ruling.

After a question by plaintiffs' counsel, defendants' attorney stated, "Objection. Gosh, what is that? [¶] The Court: What is it? [¶] Mr. Callahan: Hearsay. [¶]

The Court: Overruled. [¶] Mr. Callahan: How about – [¶] The Court: No. Go back to sleep. [¶] . . . [¶] Mr. Callahan: Wake me when it's break time. [¶] The Court: It's very close. [¶] (Laughter)." Later that day, when Mr. Callahan made an objection, the court stated, "Don't wake him up," to which Mr. Callahan replied, "Hey, I don't get a lot of sleep."

DISCUSSION

Plaintiffs' Appeal

1. *Introduction*

(1) Plaintiffs assert the judgment should be reversed because the judge committed misconduct so egregious they were denied a fair trial. We agree.

(2) In conducting trials, judges "'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side of the other.' [Citation.]" (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237-1238 [39 Cal.Rptr.3d 799, 129 P.3d 10].) Their conduct must "'"'accord with recognized principles of judicial decorum consistent with the presentation of a case in an atmosphere of fairness and impartiality.'"'" (*Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 462 [134 Cal.Rptr.2d 756].) "'The trial of a case should not only be fair in fact, . . . it should also appear to be fair.'" (*Id.* at p. 455.) The judge's actions and comments during trial violated these principles such that "'it shocks the judicial instinct to allow the judgment to stand.' [Citation.]" (*Ibid.*)

2. *Ex Parte Contact*

Plaintiffs challenge the judge's viewing of the videotape with defendants' counsel present, claiming it was improper ex parte contact that "tainted" the court's ruling on its admissibility.

(3) Generally ex parte contacts between a judge and counsel are improper, and if not unjust in actuality, give the appearance of injustice. (*See In re Hancock* (1977) 67 Cal.App.3d 943, 947-949 [136 Cal.Rptr. 901].) "A judge shall not initiate, permit, or consider ex parte communications . . . concerning a pending . . . proceeding, except" "where circumstances require, for . . . administrative purposes . . . that do not deal with substantive matters provided: [¶] . . . the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and [¶] . . . the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond." (Cal. Code Jud. Ethics, canon 3B(7)(d); *see also* Rules Prof. Conduct, rule 5-300(B) [lawyer shall not communicate with judge about merits of pending contested case except in open court, in writing, or in presence or with consent of opposing counsel].)

The record shows defendants' lawyer was present when the court previewed the video. Although it also reflects that the judge stated he would review the video at lunch, there was never any indication he

would do so with defendants' counsel present or that plaintiffs' lawyer was invited to participate.

And the contact between defense counsel and the court dealt with a substantive matter – whether or not the videotape, to which plaintiffs objected, would be admitted. As plaintiffs note, we have no way of knowing whether there was discussion during which defendants explained the video to which their lawyer would be entitled to respond.

We are not holding that either the judge or defendants' counsel intended to violate any professional standards in this instance. However, the trial judge should not have permitted counsel for only one party to participate in viewing the video with him.

3. *Lack of Courtesy and Decorum*

(4) The remainder of the court's conduct set out above was also improper. Judicial ethics require a judge to "be patient, dignified, and courteous to litigants . . . [and] . . . lawyers . . . and . . . require similar conduct of lawyers . . . under the judge's direction and control." (Cal. Code Jud. Ethics, canon 3(B)(4).) The delineated exchanges between the court and counsel are the antithesis of judicial decorum and courtesy. They cannot in any sense be characterized as "tempered miscellaneous comments," as defendants suggest. (Bold, capitalization, and underscoring omitted.)

a. Twilight Zone

We are not persuaded by defendants' assertion that many of the exchanges between the judge and defendants' lawyer, such as the *Twilight Zone* colloquy, cannot be judicial misconduct because they were made by counsel, not the judge. That misses the point. Although some of these comments were counsel's, the judge instigated and encouraged many of them. He also allowed, indeed helped create, a circus atmosphere, giving defendants' lawyer free rein to deride and make snide remarks at will and at the expense of plaintiffs and their lawyer. That was misconduct. (Cal.Code Jud. Ethics, canon 3(B)(3) ["A judge shall require order and decorum in proceedings"].)

b. *"Overruled" Signs*

The "overruled" signs also demonstrated the court's lack of courtesy and decorum. Defendants' arguments justifying this conduct are imaginative but fatuous. We reject their characterization of use of the sign as the court "overruling certain objections in writing." (Bold, underscoring, and capitalization omitted.) The judge's suggestion to plaintiffs' lawyer that she supply a "sustained" sign was not "circumspect" nor is counsel to be faulted for not "choosing" to provide one. This conduct was a sideshow in the overall circus atmosphere mocking a serious proceeding important to the parties, and it "cast the judicial system itself in a bad light in the eyes of the litigants

and the public at large." (*Hernandez v. Paicius, supra,* 109 Cal.App.4th at p. 455.)

Defendants challenge plaintiffs' argument that the court used these signs only when ruling on their objections. Again, this misses the mark. It is like saying a baseball team could not complain if the umpire decided to call balls and strikes with his eyes closed, as long as he kept them closed for both teams. The point is not that the acts were evenhanded, it is that the game could not safely be said to have been played according to the rules. And if defendants' lawyer was enjoying the spectacle, he would not object to use of the signs to overrule his objections.

Plaintiffs argue the court's use of the sign was persistent. The record does not specifically reflect it. But the fact that the sign was still in use a week after first being displayed lends support to this assertion. We agree this conduct made a mockery of plaintiffs' objections.

Defendants' argument plaintiffs waived their challenge to this behavior by failing to object to the judge's initial use of the sign he made, by commenting it was adequate, or by failing to ask for a curative instruction does not persuade. Counsel did note the judge's sign for the record; that certainly was not to approve of it. She also objected to use of defendants' sign, twice, and the court denied the objections. A request for a curative instruction would have been futile. (*People v. Sturm, supra*, 37 Cal.4th at p. 1237.)

4. *Stevenson Deposition*

a. *Improper Use of Deposition*

There was also misconduct connected to the reading of the Stevenson deposition. Plaintiffs argue actual use of the deposition testimony was improper for several reasons, including that it contained improper opinion and hearsay, and lacked foundation, and based on the failure to comply with Evidence Code section 1291, subdivision (a)(2). In addition to the erroneous ruling on admissions, plaintiffs protest the demeaning manner in which the court overruled their objections. Plaintiffs are correct on both counts.

(5) Under Evidence Code section 1291, subdivision (a)(2), subject to certain conditions not at issue here, previously recorded testimony may be offered at trial only if the deponent is unavailable as a witness. Code of Civil Procedure section 2025.620, subdivision (b) is an exception to this rule in that it allows the deposition of a party or one who was an employee of a party at the time the deposition is taken to be used at trial against the other party, whether or not the deponent is available. Here, however, Stevenson was not employed by Ricoh at the time her deposition was taken. Thus the conditions of section 2025.620, subdivision (b) were not met, and the record does not reflect any showing of Stevenson's unavailability. (Evid.Code, § 1291, subd. (a)(2); *see also* Code Civ. Proc., § 2025.620, subd. (c).) Thus, it was error to admit the testimony, and plaintiffs sufficiently objected to its admission.

b. *"Until I Die" and "187" ("Murder")*

When plaintiffs' lawyer asked for a running objection to use of the Stevenson deposition, the court agreed the objection would apply to every question "until I die." Later, when counsel raised another objection the judge overruled it, noting, Objection, 187." In response to defendants' lawyer's facetious question about Penal Code section 187, the court stated, "Murder."

It is unclear from the record exactly what the court meant when it used "187" in overruling plaintiffs' repeated objections. It could have been a sarcastic reference to the number of objections plaintiffs had made, as they contend. The "until I die" statement makes it clear the court had no use for the objections. If the colloquy had stopped at the court stating 187, it probably would not have been a factor in this case. But the judge again allowed defendants' counsel to make an inappropriate remark and joined in the continuing antics by responding to the Penal Code question with the answer, "murder."

The court and defendants' lawyer may just have been having a good time; defendants comment in their brief that the Penal Code reference was "[o]bviously . . . a humorous question." But while humor may have a legitimate place in a trial, it should not be used to belittle litigants or their counsel. Here the judge and defendants' lawyer had fun by making plaintiffs' lawyer the butt of their jokes. They took turns providing straight lines and punch lines to

each other in a way that could only convey to the jury that they were a team and plaintiffs' counsel was an outsider.

5. *Soccer Game*

Use of the "soccer-style" "red card" procedure was glaringly inappropriate, also violating the requirement of judicial decorum. In addition, in employing it the court demonstrated favoritism toward defendants. After it was initiated, defendants' attorney was allowed to raise numerous objections, some of which were overruled, and to joke with the judge without being fined. When plaintiffs' lawyer attempted to address an objection, however, she was immediately given a "red card." In instituting this game, the judge stated he wanted to "stop the talking." However, apparently he only wanted to stop plaintiffs' lawyer from talking. This unequal treatment improperly "created the impression that the trial judge was allied with [defendants]." (*People v. Sturm, supra*, 37 Cal.4th at p. 1241.)

We reject defendants' argument based on their self-described scorecard showing they received 12 red cards compared to plaintiffs' three, and concluding the "match favors [plaintiffs.]" (Bold, underscoring, and capitalization omitted.) The problem with this claim is the same as with the court's conduct. A trial is not a sporting event. Defendants' spin on this conduct is ludicrous; it was not a "circumspect" way to "'tone down'" imposition of sanctions. There was

nothing circumspect about it; it was designed to make the sanctions as obvious as possible to the jury.

6. *"Aren't They Clever"*

The "aren't they clever" comment disparaged Litton's testimony and implied he was not telling the truth and that his lawyer was trying to sneak in otherwise inadmissible evidence. (*People v. Sturm, supra*, 37 Cal.4th at p. 1240.) "[A] trial court must avoid comments that convey to the jury the message that the judge does not believe the testimony of the witness. [Citations.]" (*Id.* at p. 1238.) In addition, " '[i]t is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial.' . . . "The trial court's comment implying that . . . counsel was behaving unethically or in an underhanded fashion constituted misconduct." (*Id.* at pp. 1240-1241.)

The fact that the judge used the word "clever" at many times throughout the trial and in different contexts not all unfavorable to plaintiffs, as defendants point out, does not undo the damage inflicted by the instance of misconduct. Here there was no question the word "clever" was a derogatory reference to plaintiff Litton's testimony. That the word was used neutrally in other contexts is wholly irrelevant. "[I]t is 'the duty of the judge to *control* all proceedings during the trial, and to *limit* the introduction of evidence and the *argument* of counsel to relevant and material matters, with a view to the expeditious and

effective ascertainment of the truth regarding the matters involved.'" (*People v. Sturm, supra*, 37 Cal. 4th at p. 1237, italics added.) Obviously, that was not done here.

The other comments by defendants' counsel that the court allowed over plaintiffs' objections, including reference to Litton's "poker face" and that a question was "not a good one" for Haluck, are more examples of the inappropriate conduct that mocked plaintiffs and their testimony and impugned their credibility.

7. *Defendants' Assertions*

(6) In addition to their other arguments discussed above, defendants maintain plaintiffs waived their claims of judicial misconduct because they did not object. We disagree. Although the general rule requires objection to preserve the right to appeal acts of judicial misconduct, "failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or where objecting would be futile. [Citations.]" (*People v. Sturm, supra*, 37 Cal.4th at p. 1237.) In the atmosphere of this trial, such was the case.

Defendants also point to curative instructions, which they claim mitigated any misconduct. After a lunch break one day the judge informed the jurors he would be instructing them later about how to apply law to the facts. He pointed out that he "talk[ed] a lot and you shouldn't take anything that I say seriously

[because] I have no role in this trial. 'I have not intended by anything I have said or done or any question that I may have asked or by any rulings that I may have made to suggest how you should decide any question of fact or that I believe or disbelieve any witness. If anything I've done or said has seemed to so indicate, you must disregard it and form your own opinions.'" One of the standard jury instructions given at the end of trial repeated the language the jury should not decide based on the judge's statements or actions.

(7) But neither instruction was directed to any particular misconduct, so the jury would have no way of knowing to what it referred. Further, in light of all the improper comments by the court and those it allowed from defendants' lawyer, the instructions constituted only a dribble of water incapable of quenching a blazing fire. "Jurors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials. [Citation.]" (*People v. Sturm, supra*, 37 Cal.4th at p. 1233; *see also People v. Santana* (2000) 80 Cal.App.4th 1194, 1207 [96 Cal.Rptr.2d 158] [admonitions throughout trial did not cure judge's statements giving impression he found defense case weak].) Having served in that capacity, we are well aware of the tremendous power the comments and attitude of a trial judge have on a jury. That power was repeatedly abused during this case and a passing admonition was not enough to cure it.

(8) Defendants examine each act of misconduct individually and argue that a jury could not have perceived bias based on one comment during a 31-day trial. But it is the total effect of these acts and statements that is fatal. "Although no one instance of misconduct appears to, in itself, require reversal, the cumulative effect of the trial judge's conduct requires reversal." (*People v. Sturm, supra*, 37 Cal.4th at p. 1243.) Further, we reject defendants' argument that the misconduct on which plaintiffs rely cannot be characterized as pervasive because it only spanned day 7 to day 22 of the trial.

In addition, defendants' 50-page-plus list of instances where they lost objections does not ameliorate the misconduct. Likewise, the fact the judge chastised their lawyer many times or was rude to him does not justify his other improper acts and comments. Moreover, to the extent this is true, neither side received a fair trial. That both parties were subjected to this conduct should not be a basis for affirming the judgment. Furthermore, as plaintiffs note, they bore the burden of proof. So the question is whether the court so interfered with their case it was impossible to meet that burden.

8. *Misconduct Requires Reversal*

"Where, as here, the appearance of judicial bias and unfairness colors the entire record, we depart from the general rule requiring plaintiff to make an affirmative showing of prejudice. The test is not

whether plaintiff has proved harm, but whether the court's comments would cause a reasonable person to doubt the impartiality of the judge or would cause us to lack confidence in the fairness of the proceedings such as would necessitate reversal. The record here inspires no confidence in either case." (*Hernandez v. Paicius, supra*, 109 Cal.App.4th at p. 461.)

"We scrupulously guard against bias and prejudice, actual or reasonably perceived, not only to prevent improper factors from influencing the fact finder's deliberations, but to vindicate the reputation of the court itself. . . . 'We must also keep in mind . . . that the source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had.'" (*Hernandez v. Paicius, supra*, 109 Cal.App.4th at p. 462; *see* Cal. Code Jud. Ethics, canon 2(A) ["A judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"].)

It is obvious that much of the judge's conduct was not malicious but rather a misguided attempt to be humorous; and defendants' lawyer played into it, often acting as the straight man. But a courtroom is not the Improv and the presider's role model is not Judge Judy. We can only imagine what was in the jurors' minds as they endured a 30-day-plus trial in this atmosphere or the impression of the judicial system they took away with them posttrial.

"Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided [citation], but should reverse the judgment and remand the matter to a different judge for a new trial on all issues." (*Catchpole v. Brannon* (1995) 36 Cal.App.4th237, 247 [42 Cal.Rptr.2d 440].) We do that here.

Defendants' Appeal

Defendants filed a protective cross-appeal from the court's denial of their motions for summary judgment and motions for summary adjudication of issues on the ground that the action was barred by the Japanese Friendship, Commerce and Navigation Treaty of 1953 (treaty), particularly Article VIII(1) (Apr. 2, 1953, 4 U.S.T. 2063, T.I.A.S. No. 2863). Article VIII(1) provides that "companies of either Party [to the treaty] shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." (4 U.S.T. 2063, 2070.) Article VIII(1) is "intended to give both parties to the treaty a degree of discretion in staffing enterprises operating in the other's country with managerial or technical personnel from the home country. [Citation.]" (*Kirmse v. Hotel Nikko* (1996) 51 Cal.App.4th 311, 317 [59 Cal.Rptr.2d 96].)

Defendant Ricoh, a United States company, is a wholly owned subsidiary of Ricoh Corporation, a New Jersey corporation, which is a wholly owned subsidiary of Ricoh Company, Ltd., a Japanese corporation (Ricoh Japan). Defendants assert that any claim of discrimination against plaintiffs on the basis of their race or national origin was only Ricoh Japan placing its employees at defendant Ricoh "on a temporary basis in key management and technical positions . . . as permitted by the [t]reaty." Since the treaty allows such temporary employees, they continue, it bars plaintiffs' suit.

(9) The one California case on this subject, *Kirmse v. Hotel Nikko, supra*, 51 Cal.App.4th 311, rejects defendants' claim, holding that the treaty "does not apply to a domestically incorporated subsidiary of a Japanese corporation." (*Id.* at p. 317.) In arriving at this decision, *Kirmse* relied on *Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 U.S. 176 [72 L.Ed.2d 765, 102 S.Ct. 2374]. It contained a detailed analysis of the treaty and its underlying intent and went to great lengths to distinguish between United States branches of a Japanese corporation, which would be subject to the terms of the treaty, and locally incorporated subsidiaries, which would not. *Sumitomo* reasoned that because Sumitomo Shoji America was incorporated in New York, it was "a company of the United States, not a company of Japan. As a company of the United States operating in the United States, under the literal language of . . . the [t]reaty, Sumitomo cannot invoke the rights

provided in Article VIII(1), which are available only to companies of Japan operating in the United States and to companies of the United States operating in Japan." (*Sumitomo Shoji America, Inc. v. Avagliano, supra*, 457 U.S. at pp. 182-183, fn. omitted.)

Defendants primarily rely on a footnote in *Sumitomo* in which the court noted that it expressed no view on whether a United States subsidiary of a Japanese corporation could assert its parent's rights under the treaty. (*Sumitomo Shoji America, Inc. v. Avagliano, supra*, 457 U.S. at pp. 189-190, fn. 19.) They claim defendant Ricoh may assert such rights. *Kirmse* considered that issue, noting that in some circumstances, namely piercing the corporate veil or where there was a closely-related third party, a subsidiary could have standing to assert rights under the treaty. (*Kirmse v. Hotel Nikko, supra*, 51 Cal.App.4th at p. 321.)

(10) Here, there is no claim of piercing the corporate veil. Defendants advance the theory that Ricoh Japan is a closely-related third party. They point to *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614, [114 L.Ed.2d 660, 111 S.Ct. 2077], which stated, in "'certain, limited exceptions,' . . . a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests." (*Id.* at p. 629.)

Defendants fail to meet this burden. They argue Ricoh Japan has suffered injury but do not address whether defendant Ricoh, "the litigant," has been harmed. Moreover Ricoh is not even a direct subsidiary of Ricoh Japan; it is owned by Ricoh Corporation, a New Jersey corporation, which is the subsidiary of Ricoh Japan. Defendants have not shown *Edmonson* or any other authority would allow standing in such an attenuated circumstance.

Defendants also rely on *Fortino v. Quasar Co.* (7th Cir. 1991) 950 F.2d 389, which distinguished *Sumitomo* on the ground that in that case, there was no claim the subsidiary's discriminatory conduct had been mandated by the Japanese parent. In a well-reasoned discussion, *Kirmse* found *Fortino* unpersuasive and rejected it. (*Kirmse v. Hotel Nikko, supra*, 51 Cal.App.4th at pp. 319-321.) We agree with its conclusions and see no need to reiterate that discussion. Likewise, none of the other federal cases defendants cite dissuades us from our conclusion the treaty does not protect defendant Ricoh.

DISPOSITION

The judgment is reversed. The motion for sanctions is denied. On remand the case shall be assigned to a different judge. Appellants Michael Litton and James Haluck are entitled to costs on appeal.

Sills, P. J., and Bedsworth, J., concurred.

JAMES HALUCK et al., Plaintiffs and Appellants, v. RICOH ELECTRONICS, INC., et al., Defendants and Appellants.

G035681

COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

2007 Cal. App. LEXIS 1114

June 1, 2007, Filed

JUDGES: Rylaarsdam, J., with Sills, P. J., and Bedsworth, J., concurring.

OPINION

RYLAARSDAM, J. – ORDER MODIFYING OPINION

NO CHANGE IN JUDGMENT

It is ordered that the opinion filed herein on June 1, 2007, be modified in the following particulars only:

1. On page 13, in the second full paragraph on line three starting with "inadmissible evidence," delete "(*People v. Sturm, supra*, 37 Cal.App.4th at p. 1240.)" and replace it with

"(*People v. Sturm, supra*, 37 Cal.4th at p. 1240.)"

2. On page 13, in the second full paragraph on line seven starting with "the competence, honesty," delete the entire quote

starting with "Where the trial court," and replace it with:

"The trial court's comment implying that . . . counsel was behaving unethicvally or in an underhanded fashion constituted misconduct."

These modifications do not change the judgment.

Sills, P. J., and Bedsworth, J., concurred.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE,
CENTRAL JUSTICE CENTER

JAMES HALUCK and MICHAEL LITTON, Plaintiffs, vs. RICOH ELECTRONICS, INC., a California corporation; LARRY VAUGHN, an individual; HARUO UESAKA, an individual; YOJI IDE, and individual; YASUAKI MURAMATSU, and individual; YOSHIHIRO NOMURA, and individual; HOUSSAM EL JURDI, an individual; and DOES 1 through 10, Inclusive, Defendants.	Case No. 03 CC 10166 Assigned for All Purposes to: Hon. James M. Brooks Department C-12 ~~[PROPOSED]~~ ORDER PARTIALLY DENYING AND PARTIALLY GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES (Filed Nov. 8, 2004) DATE: September 29, 2004 TIME: 3:00 p.m. DEPT: C-12

) Complaint Filed
) August 12, 2003
) Trial Date:
) November 8, 2004

The nine Motions for Summary Judgment filed by Defendants came on regularly for hearing on September 29, 2004 at 3:00 p.m., in Department C-12 of the Orange County Superior Court, Central Justice Center. Michelle A. Reinglass, Esq. and John Y. Igarashi, Esq. of the Law offices of Michelle A. Reinglass appeared on behalf of Plaintiffs. Kenneth Rose, Esq. of Littler Mendelsoh appeared on behalf of all appearing Defendants. After full consideration of the evidence and points and authorities and the Separate Statements submitted by all parties, and oral argument of counsel, the Court ruled in the following manner:

Motion No. 1 – Defendant REI vs. Plaintiff Haluck

Issue No. 1 – Denied

Defendant REI contends the First Cause of Action is barred by the US-Japan Treaty of Friendship, Commerce and Navigation. Defendants also contend that the cause of action is also barred by Defendants's "bona fide occupational qualification" defense, is time-barred and fails as a matter of law.

The format of Defendant's Motion is not in compliance with California Rules of Court 342(h), in that Defendant asserts various theories on which First

Cause of Action is barred, but combines them all in a single issue in the Separate Statement. Due to this defect of format, a finding of any triable issue, e.g., on the occupational qualification defense, would result in denial of summary adjudication of issues as to the First Cause of Action, regardless of the other theories. This is analogous to finding that a defective summary adjudication of issues motion will be treated solely as one for summary judgment. This procedural defect is repeated throughout all 9 motions.

As to the treaty issue, Defendants argues that although the only California case on point, *Kirmse v. Hotel Nikko of San Francisco, Inc.*, (1996) 51 Ca1.4th 311, 321, held that the treaty applies only to Japanese companies operating in the US (and US companies in Japan) and not to subsidiaries of the Japanese company, there is Federal precedent (cited at page 11 of Defendant's motion) to the contrary. The Court denies Defendant's Motion, applies California law, and finds that REI cannot invoke the treaty.

As to the "bona fide occupational qualification" defense, Defendant claims that the subject occupations (to which plaintiffs were not promoted) require an advanced level of expertise and proprietary knowledge of REI processes and an ability to speak Japanese. The Court denies summary adjudication on this point. There are triable issues of fact whether the people promoted to the positions were more qualified than plaintiffs and whether the ability to speak Japanese was a job requirement. See Plaintiffs Separate Statement in Opposition to Motion for Summary

Judgment, Fact Nos. 1, 2, 6, 12. [Haluck's Evidence, Fact Nos. 1, 2]: Declaration of Haluck, paragraphs 5-8; [Haluck' s Evidence, Fact No. 6]: Declaration of Haluck, paragraphs 12-14. [Haluck's Evidence, Fact No. 12]: Nguyen Deposition, vol. 1, 196:15-23 (Ex. 19 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck); Walsh Deposition, vol. 1, 160:23-161:21, 162:17-25, 165:25-166:5 (Ex. 14 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck); El Jurdi Deposition, vol. 2, 265:22-23 (Ex. 20 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck);Walsh Deposition, vol. 1, 158:20-159:6 (Ex. 14 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck).

Defendant argues that "part" of Plaintiff's First Cause of Action is time barred, but as Plaintiff points out, summary adjudication of issues must dispose of the entire cause of action. Defendant submits no authority for the partial adjudication of a claim. This alone supports denial.

Further, there is a triable issue of fact whether the "continuing violation" doctrine applies, so as to toll the accrual of the statute of limitations. Defendant again cites to Federal law construing Title VII, that where there are discrete/independent discriminatory acts, such as failure to promote, each act represents a separate and potentially actionable employment practice (see pages 19:19-21 of Defendant's motion). Under California law, *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, the Continuing Violation Doctrine will toll the Statute of limitations where there

are similar kinds of employer conduct, which has occurred with reasonable frequency, and has not acquired a degree of permanence.

Defendant also argues the discrimination claim fails as a matter of law because Plaintiff can't show a discriminatory motive, but here there is both direct evidence and circumstantial evidence of discriminatory motive. Seen in Plaintiff's declaration, reflected in Plaintiff's Separate Statement of Evidence, Fact Nos. 1-29. [Haluck's Evidence, Fact Nos. 1-29]: Haluck Declaration, paragraphs. 2-22; Haluck Declaration Exhibits. "1"-"11"; William Nguyen Deposition Pages 73: 4-19; 78:4-17;116:3-117:20; 123:2-5;125:2-6.

Issue No. 2 – Denied

Defendant contends that the Second Cause of Action for retaliation is partially time-barred and Plaintiff cannot establish a prima facie case of retaliation. The partially time-barred argument fails here for the same reason as on issue No. 1. Further, there is a triable issue of fact whether repeated acts of retaliation are tolled under the continuing violation doctrine. See Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 41, 45, re the last act occurring within the statute of limitations and No. 45 as evidence of retaliation. [Haluck's Evidence, Fact No. 45]: Ex. 28. to Declaration of Rachel Goldstein Re Lodgment of Evidence in Support of MSJ-Haluck.

As to the argument re establishing a prima facie case re retaliation, there are triable issues of fact as to whether Defendants's giving Nguyen the director's title was too remote in time (10 months) to constitute a causal relation between the acts, and whether Plaintiff's title change was a "substantial" and "material adverse effect" on Plaintiff's employment.

Issue No. 3 - Denied

Defendant contends that Plaintiff's Third Cause of Action for Failure to Prevent Discrimination fails.

Defendant takes the position here that, since there was no discrimination (Defendant's contention), there can be no cause of action for failure to prevent discrimination. But since there are disputed facts re discrimination occurring, see Issue No. 1, this summary adjudication of issues must be denied. There is also issue of fact as to whether Plaintiff Haluck followed Defendant's "Employer Problem Resolution Policy." See Plaintiffs' Separate Statement in Opposition to Motion for Summary Judgment at Fact No. 60. [Haluck's Evidence, Fact No. 60]: Haluck Deposition, vol. 1, 18:16-20:2; 24:13-24; Ex. 21 to Declaration of Rachel Goldstein Re Lodgment of Evidence in Support of MSJ-Haluck.

Issue No. 4

Defendant contends that Plaintiff's Fourth Cause of Action for Adverse Employment Action in

Violation of Public Policy is partially time-barred and fails as a matter of law because Plaintiff can't establish either discrimination or retaliation (Defendant's contention).

The partially time-barred argument fails, no partial adjudication as to events remote in time. Further, though Defendant argues for application of the one year statute of limitations under CCP 340(3), the CCP 335.1 statute of limitations is two years and took effect January 1, 2003. Although it can't "revive" state claims, this action was filed August 2003, and the last failure to promote complained of was in June, 2002, within two years. See Plaintiffs Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 67, 68. [Haluck's Evidence, Fact No. 67]: Ex. 3, Ex. 28 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck; [Haluck's Evidence, Fact No. 68]: Haluck Deposition, Vol. 2, 153:22-154:15; 151:24-152:1, 153:1-13, 154:13-15.

As to the argument that Plaintiff's failure to establish discrimination or retaliation bars any public policy violation cause of action, there are triable issues as to discrimination (see Issue No. 1), that creates triable issues here.

Issue No. 5 – Granted

Sixth Cause of Action for Breach of Express and Implied Contract.

Defendant contends that Plaintiff was an at-will employee. See Defendant's Separate Statement at Fact Nos. 70, 71, 72, 75, 76. [Haluck's Evidence No. 70, 71, 72, 75, 76]: Haluck's Response to Form Interrogatory No. 50.2; Haluck's Response to Employment Form Interrogatory No. 200.2(a); Ex. 25 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck; Bates stamp Nos. D0062-0073. Plaintiffs evidence is insufficient to raise triable issues of fact, comments of employees are not sufficient to overcome numerous written documents relied upon by Defendant. The Court grants summary adjudication of issues as to the Sixth Cause of Action.

Issue No. 6 - Granted

Defendant contends that Plaintiffs Seventh Cause of Action for Breach of Good Faith and Fair Dealing cannot lie where there is no employment contract.

Granted based upon granting of prior issue No. 5, as the Seventh Cause of Action must be based on an enforceable contract. Plaintiffs evidence is insufficient to find an enforceable contract.

Issue No. 7 - Denied

Defendant contends that Plaintiffs's Eighth Cause of Action for Intentional Infliction of Emotional Distress is barred by one year statute of limitations, because Defendants's conduct is not outrageous as a

matter of law, and because the conduct is work-related and barred by the exclusivity provisions of Worker's Compensation.

Defendant again seeks "partial summary judgment" for conduct allegedly time-barred, but submits no authority in support of this procedure. Further, as argued previously, the one year statute of limitations of CCP 335.1 was extended to two years in January 2003; the two years statute of limitations applies.

Defendant concedes that the workers compensation exclusivity rule does not bar suits for emotional distress damages resulting from discriminatory or retaliatory conduct, but contends Plaintiff Haluck has failed to establish discrimination or retaliation. As noted above, there are triable issues as to both discrimination and retaliation, so there is triable issue as to whether Defendant's conduct is outrageous and whether Plaintiff's action is barred by workers compensation exclusivity rule.

Issue No. 8 – Granted

Defendant contends that Plaintiff's Ninth Cause of Action for Negligent Infliction of Emotional Distress is time-barred by the one year statute of limitations, because intentional acts don't constitute negligence and are barred by the exclusivity provisions of workers compensation.

The one year statute of limitations doesn't apply, see prior analysis. Nor does workers compensation

exclusivity bar the action, as there are triable issues of fact Plaintiff Haluck can establish racial discrimination or retaliation

But granted on basis of *Semore v. Pool* (1990) 217 Cal App.3d, 1087, 1105 and *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d, 148, 160, which hold that an employer's supervisory conduct is inherently intentional thus it won't support a cause of action of negligent infliction of emotional distress. Plaintiff relies on *Maynard* 37 F.3d 1396, 1405-1406, where both intentional infliction of emotional distress and negligent infliction of emotional distress claims were submitted to jury, but this particular issue wasn't raised in that case, and Plaintiff fails to distinguish *Semore* and *Cole*.

Motion No. 2 – Defendant REI vs. Plaintiff Litton

This summary judgment by REI vs. Litton largely mirrors the same issues asserted in Motion No. 1 against Plaintiff Haluck. Where the issues are the same, the ruling will refer back to the prior motion. Differences will be addressed. Note that the Fifth Cause of Action for *Labor Code* section 970 violations is asserted solely by Plaintiff Litton.

Issue No. 1 – Denied – (same as Motion No. 1 – Issue No. 1)

Defendant contends that the First Cause of Action for Discrimination is barred by the Treaty, by

the Occupational Qualification Defense, and is time-barred.

The Court denies summary adjudication of issues. As to arguments concerning the treaty, see Motion No. 1, i.e., the treaty doesn't apply to subsidiaries and there are triable issues as to the "bona fide occupational qualification" defense. See Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 1, 2, 6, 12. [Litton's Evidence, Fact Nos. 1 and 2]: Declaration of Litton, paragraphs 4, 5, 6, 7; [Litton's Evidence, Fact No. 6]: Declaration of Litton, paragraphs 11, 12, 13; [Litton's Evidence, Fact No. 12]: Nguyen Deposition, vol. 1, 196:15-23 (Ex.18 to Declaration of Rachel Goldstein Re Lodgment of Evidence in Support of Plaintiff Michael Litton's Opposition to MSJ); El Jurdi Deposition, vol. 2, 265:22-23; (Ex. 17 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Litton); Walsh Deposition, vol. 1, 158:20-159:6; 160:23-161:21, 162:17-25, 165:25-166:5 (Ex 23 to Declaration of Rachel Goldstein Re Evidence in Support of Plaintiff Michael Litton's Opposition to MSJ).

Regarding the time-bar argument, Plaintiff Litton complains of different events than Plaintiff Haluck, was passed over for Manager or Director of Engineering between 1996 and 1998, and for QES department in April 2001 (Complaint at paragraphs 21-35). But, as on prior motion, partial summary judgment is not allowed and CCP 335.1 statute of limitations of 2 years applies. Further, there is triable issue of fact whether the Continuing Violation

Doctrine tolls the statute of limitations. Plaintiff Litton was terminated on January 2, 2002, filed administrative complaint with the Department of Fair Housing and Employment on November 15, 2002, and filed this complaint on August 12, 2003.

Defendant again argues that Plaintiff Litton fails as a matter of law to establish discrimination claim. Defendant claims the only discriminatory act during the limitations period was Plaintiff Litton's layoff, but since there are triable issues re the application of the continuing violation doctrine, the Court denies summary adjudication of issues on this ground. Defendant also argues there was good cause for the layoff. This is a triable issue of fact, see Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment, Fact No. 44. [Litton's Evidence, Fact No. 44]: Litton Declaration., par.16; Morrissey Deposition, 112:20-113:3; Ex. 8 to Declaration of Rachel Goldstein in Re Lodgment of Evidence-Litton.

Issue No. 2 – Denied

Defendant contends the Second Cause of Action for Retaliation is partially untimely and there is no causal nexus between Plaintiff Litton's protected conduct and his failure to obtain promotions or decisions to lay off.

The Court Denies Defendant's motion as to the partially untimely argument, and also denies Defendant's motion based on factual issues concerning the application of the continuing violation doctrine.

As to the causal connection being too remote, Defendant contends that because Plaintiff Litton's last complaints were made in April 2001, and his layoff didn't occur until seven months later in January 2002, that Plaintiff's protected conduct is too remote in time for a claim of retaliation. *Clark County School Dist. v. Breeden* (2001) 532 US 267 (citing *Richmond v. V. ONEOK, Inc.* (10th Cir. 1997) 120 F.3d 205, 209). Here, the Court will treat the question of whether events are sufficiently contemporaneous as triable issue of fact.

Defendant also claims legitimate grounds to layoff Plaintiff Litton, but there is triable issue of act. See Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment, at Fact No. 60 (same as No. 44 on Motion No. 1). [Litton's Evidence, Fact No. 60 – same as No. 44 of Haluck's evidence]: Uesaka Deposition, v. 1, 87:24-88:8; 87:9-19.

Issue No. 3 – Denied

Defendant contends that Plaintiff's Third Cause of Action for Failure to Prevent Workplace Discrimination fails.

This issue is the same as Issue No. 3 on Motion No. 1. The Court denies Defendant's Motion for the same reasons, i.e., there are disputed facts regarding whether discrimination occurred, and whether Plaintiff Litton complied with Defendant's policy regarding discriminatory complaints. See Plaintiffs Separate Statement in Opposition to Motion for Summary

Judgment at Fact Nos. 65-67. [Litton's Evidence, Fact Nos. 65-67]: Litton Deposition, vol. 1, 101:3-15, 108:10-25, 109:18-110:11, 114:20-25, 115:7-19, 116:19-117:15, 120:17-21, 121:25-122:3, 125:14-126:14 (Ex. 4 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Litton);

Issue No. 4 – Denied

Defendant contends that Plaintiffs Fourth Cause of Action for Adverse Employment Action in Violation of Public Policy is time-barred and fails because Plaintiff can not establish discrimination or retaliation.

Defendant repeats argument that the one year statute of limitations applies, but the two year statute of limitations of CCP 335.1 applies. Defendant also claims that Plaintiff Litton has failed to establish discrimination/retaliation, but there are triable issues as to whether discrimination occurred (see Issue No. 1). The Court denies Defendant's Motion as to the Fourth Cause of Action.

Issue No. 5 – Granted

Defendant contends that Plaintiff's Fifth Cause of Action for Violation of Labor Code 970 fails because it was not filed within one year and because Plaintiff Litton fails to establish he detrimentally relied on misrepresentations.

This is a statutory claim against an employer for knowingly making false representations. The representations were made when Plaintiff Litton was offered employment in May/June 1996. Defendant cites *Munoz v. Kaiser Steel Corp.* (1984) 156 Cal.App.3d 965, 980, for contention that a worker's claim for knowingly false representations accrued on the date they were discharged. For Plaintiff Litton, that date is January 2, 2002, and his complaint was filed August 12, 2003. Although Plaintiff notes that the *Aguilera* court also applied the one year statute of limitations, it expressed doubt whether this was correct. Plaintiff seeks to apply the three year statute of limitations for statutory violations in CCP 338. The Court applies the one year statute of limitations used by authorities for both parties, and grants Defendant's motion on the ground that Plaintiffs cause of action is time-barred.

Issue No. 6 – Granted

Defendant contends that Plaintiffs Sixth Cause of Action for Breach of Contract fails because Plaintiff was an at-will employee.

As on Motion No. 1, Issue 5, Defendant contends based on handbook and other documents, that Plaintiff was an at-will employee. See Defendant's Separate Statement at Fact Nos. 80, 82, 84, 85. Plaintiff Litton relies on the same insufficient evidence as Plaintiff Haluck in trying to create triable issues of

fact. The Court grants summary adjudication on this issue.

Issue No. 7 - Granted

Defendant contends that Plaintiffs Seventh Cause of Action for Breach of Good Faith and Fair Dealing fails because there is no employment contract.

The Court grants summary adjudication on this issue. This cause of action fails due to summary adjudication of issues being granted on Issue No. 6; there is no enforceable contract on which to base cause of action.

Issue No. 8 - Denied

Defendant contends that the Eighth Cause of Action for Intentional Infliction of Emotional Distress fails because Plaintiff Litton neglected to file his complaint within one year statute of limitations and because employment actions do not rise to the level of outrageous conduct.

The Court denies Defendant's motion for same reasons as Issue No. 7 in Motion No. 1, i.e., the two year statute of limitations of CCP 335.1 applies and there are triable issues of fact whether discrimination or retaliation occurred and thus there is question whether this is normal part of work environment and barred by workers' compensation exclusivity.

Issue No. 9 – Granted

Defendant contends that the Ninth Cause of Action for Negligent Infliction of Emotional Distress is time-barred and fails because intentional torts cannot sustain a cause of action of negligence.

The Court denies Defendant's Motion as to Defendant's theory that the claim is time-barred based on one year statute of limitations; see prior analysis.

However, the Court grants Defendant's motion as to negligent infliction of emotional distress based on *Semore,* 217 CA 3d 1087, 1105 and Cole 43 Cal.3d at 160. The acts of supervisors are inherently intentional and cannot support a cause of action for negligent infliction of emotional distress.

Motion No. 3 – Defendant Vaughn vs. Plaintiff Haluck – Denied, except as to the Ninth Cause of Action, which is Granted

Motion No. 5 – Defendant Nomura vs. Plaintiff Halnuk – Denied except as to the Ninth Cause of Action, which is Granted

Motion No. 7 – Defendant Uesaka vs. Plaintiff Haluck – Denied except as to the Ninth Cause of Action, which is Granted

Motion No. 9 – Defendant Ide vs. Plaintiff Haluck – Denied except as to the Ninth Cause of Action, which is Granted

These motions are addressed together, as Defendants have submitted a combined separate statement in support of these four motions. It is attached to motion No. 3.

Motions No. 3, 5, 7, 9 are for summary judgment or summary adjudication of issues as to each of the causes of action asserted against the individual Defendants.

– Second Cause of Action – Retaliation

– Eighth Cause of Action – Intentional Infliction of Emotional Distress

– Ninth Cause of Action – Negligent Infliction of Emotional Distress

As to all Defendants, summary adjudication of issues as to the Ninth Cause of Action for negligent infliction of emotional distress should be granted for same reasons as it was granted as to Defendant REI.

As to the Second and Eighth Causes of Action, the Court denies summary adjudication of issues as to all Defendants, despite the feeling that Plaintiff has no significant evidence against any of these individual Defendants that they retaliated against or committed outrageous acts against Plaintiff Haluck. Defendants as the moving party have the burden of proof. As to the acts complained of in 1995, there is no evidence that Defendants Vaughn, Nomura and Ide did not participate in this decision, which may not be time-barred if the continuing violation doctrine is found to apply.

As to Defendant Uesaka, although there is evidence he did not arrive until 2001, there is evidence he participated in the promotion of Nguyen to Director of Engineering in 2002. This could be evidence of retaliation and intentional discrimination, and could constitute outrageous conduct. See Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 4, 6, 9, 10. [Haluck's Evidence, Fact No. 4]: Haluck Declaration, paragraph 11; [Haluck's Evidence, Fact No. 6]: Haluck Declaration, paragraphs 12, 13, 14; [Haluck's Evidence, Fact No. 9 and 10]: Interrogatory, Set 2, Nos. 11, 12 and 14 (Ex. 16 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck): Haluck Deposition, vol. 1, 89:2-93:1 (Ex. 5 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Haluck).

Motion No. 4 – Defendant Vaughn vs. Plaintiff Litton – Granted

Motion No. 6 – Defendant Nomura vs. Plaintiff Litton – Denied, except as to the Ninth Cause of Action, which is Granted

Motion No. 8 – Defendant Jurdi vs. Plaintiff Litton – Granted

These motions are addressed together, as Defendants have submitted a combined separate statement in support of these three motions. It is attached to motion No. 4.

As on motions Nos. 3, 5, 7, 9, these motions are for summary judgment or summary adjudication of

issues as to each of the three causes of action asserted against the individual Defendants.

– Second Cause of Action – Retaliation

– Eighth Cause of Action – Intentional Infliction of Emotional Distress

– Ninth Cause of Action – Negligent Infliction of Emotional Distress

As to Defendant Vaughn, the Court grants summary judgment. See Defendant's Separate Statement at Fact Nos. 36-41. Plaintiff has no evidence that Vaughn committed any acts of retaliation or committed any outrageous conduct against Plaintiff Litton. Plaintiff Litton's sole evidence is that Plaintiff "felt" Vaughn was part of the mistreatment because he failed to stop it. This is insufficient.

As to Defendant Jurdi, the Court grants summary judgment. See Defendant's Separate Statement at Fact Nos. 36-41. Plaintiff has no evidence that Jurdi committed any acts of retaliation or outrageous conduct against Plaintiff Litton. Plaintiff's sole evidence is that Jurdi told him he was being laid off, and participated in coming up With the criteria for layoff. This is insufficient to constitute retaliation or outrageous conduct.

As to Defendant Nomura, summary adjudication of issues will be granted on the Ninth Cause of Action for negligent infliction of emotional distress for the same reasons it was granted as to Defendant REI.

As to Second and Eighth Causes of action, the Court denies summary adjudication. There is evidence that Nomura knew of Plaintiff Litton's interest in promotion to certain positions before those positions were filled by other Asian employees. See Plaintiff's Separate Statement in Opposition to Motion for Summary Judgment at Fact Nos. 16-19. [Litton's Evidence, Fact No. 16]: Litton Deposition, vol. II, 197:15-20 (Ex. 4 to Declaration of Rachel Goldstein Re Lodgment of Evidence-Litton); [Litton's Evidence, Fact No. 17 and 19]: Litton Declaration, par. 8; Ex. 7. Unlike Defendants Vaughn and Jurdi, Defendant Nomura fails to meet burden of proof that he did not retaliate against Plaintiff Litton. On the Eighth Cause of Action, Nomura fails to meet his burden of proof, only addresses the questions of Plaintiff Litton's layoff, but fails to present evidence as to the earlier conduct alleged, which may not be found to be time-barred.

With respect to the evidentiary objections made by the parties, the Court rules as follows: all evidentiary objections are overruled.

IT IS THEREFORE ORDERED that the said Motions for Summary Judgment or, in the Alternative, for Summary Adjudication of Issues, be denied or granted as detailed above.

DATED: 11-8, 2004

JAMES M. BROOKS

Honorable James M. Brooks
Orange County Superior
Court Judge

Court of Appeal, Fourth Appellate District,
Div. 3 – No. G035681
S15432

(Filed Aug. 29, 2007)

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JAMES HALUCK et al., Plaintiffs and Appellants,

v.

RICOH ELECTRONICS INC. et al.,
Defendants and Appellants.

The petition for review is denied.

GEORGE
Chief Justice

U.S. Treaties on LEXIS

JAPAN

FRIENDSHIP, COMMERCE AND NAVIGATION

TIAS 2863

4 U.S.T. 2063; 1953 U.S.T. LEXIS 122

April 2, 1953, Date-Signed

October 30, 1953, Date-In-Force

STATUS:

Treaty and Protocol between the UNITED STATES OF AMERICA and JAPAN Signed at Tokyo April 2, 1953

Ratification advised by the Senate of the United States of America, with a reservation, July 21, 1953

Ratified by the President of the United States of America, subject to said reservation, September 15, 1953

Ratified by Japan, with a reservation, September 2, 1953

Ratifications exchanged at Washington September 30, 1953

Proclaimed by the President of the United States of America November 4, 1953

Entered into force October 30, 1953

TREATY OF FRIENDSHIP, COMMERCE AND NAVIGATION BETWEEN THE UNITED STATES OF AMERICA AND JAPAN
[FOREIGN LANGUAGE TEXT OMITTED]

TEXT:

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS a treaty of friendship, commerce and navigation between the United States of America and Japan, together with a protocol relating thereto, was signed at Tokyo on April 2, 1953, the originals of which treaty and protocol, in the English and Japanese languages, are word for word as follows:

The United States of America and Japan, desirous of strengthening the bonds of peace and friendship traditionally existing between them and of encouraging closer economic and cultural relations between their peoples, and being cognizant of the contributions which may be made toward these ends by arrangements promoting mutually advantageous commercial intercourse, encouraging mutually beneficial investments, and establishing mutual rights and privileges, have resolved to conclude a Treaty of Friendship, Commerce and Navigation, based in general upon the principles of national and of most-favored-nation treatment unconditionally accorded, and for that purpose have appointed as their Plenipotentiaries,

The United States of America:

Robert Murphy, Ambassador Extraordinary and Plenipotentiary of the United States of America to Japan, and

Japan:

Katsuo Okazaki, Minister for Foreign Affairs of Japan,

Who, having communicated to each other their full powers found to be in due form, have agreed upon the following Articles:

ARTICLE I

1. Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens.

2. Nationals of either Party, within the territories of the other Party, shall be permitted: (a) to travel therein freely, and to reside at places of their choice; (b) to enjoy liberty of conscience; (c) to hold both private and public religious services; (d) to gather and to transmit material for dissemination to the public abroad; and (e) to communicate with other

persons inside and outside such territories by mail, telegraph and other means open to general public use.

3. The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety.

ARTICLE II

1. Nationals of either Party within the territories of the other Party shall be free from unlawful molestations of every kind, and shall receive the most constant protection and security, in no case less than that required by international law.

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

ARTICLE III

1. Nationals of either Party shall be accorded national treatment in the application of laws and regulations within the territories of the other Party that establish a pecuniary compensation, or other

benefit or service, on account of disease, injury or death arising out of and in the course of employment or due to the nature of employment.

2. In addition to the rights and privileges provided in paragraph 1 of the present Article, nationals of either Party shall, within the territories of the other Party, be accorded national treatment in the application of laws and regulations establishing compulsory systems of social security, under which benefits are paid without an individual test of financial need: (a) against loss of wages or earnings due to old age, unemployment, sickness or disability, or (b) against loss of financial support due to the death of father, husband or other person on whom such support had depended.

ARTICLE IV

1. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without registration or similar requirements.

2. Contracts entered into between nationals and companies of either Party and nationals and companies of the other Party, that provide for the

settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of such other Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such other Party. Awards duly rendered pursuant to any such contracts, which are final and enforceable under the laws of the place where rendered, shall be deemed conclusive in enforcement proceedings brought before the courts of competent jurisdiction of either Party, and shall be entitled to be declared enforceable by such courts, except where found contrary to public policy. When so declared, such awards shall be entitled to privileges and measures of enforcement appertaining to awards rendered locally. It is understood, however, that awards rendered outside the United States of America shall be entitled in any court in any State thereof only to the same measure of recognition as awards rendered in other States thereof.

ARTICLE V

1. Neither Party shall take unreasonable or discriminatory measures that would impair the legally acquired rights or interests within its territories of nationals and companies of the other Party in the enterprises which they have established, in their capital, or in the skills, arts or technology which they have supplied; nor shall either Party unreasonably impede nationals and companies of the other Party from obtaining on equitable terms the capital, skills,

arts and technology it needs for its economic development.

2. The Parties undertake to cooperate in furthering the interchange and use of scientific and technical knowledge, particularly in the interests of increasing productivity and improving standards of living within their respective territories.

ARTICLE VI

1. Property of nationals and companies of either Party shall receive the most constant protection and security within the territories of the other Party.

2. The dwellings, offices, warehouses, factories and other premises of nationals and companies of either Party located within the territories of the other Party shall not be subject to unlawful entry or molestation. Official searches and examinations of such premises and their contents, when necessary, shall be made only according to law and with careful regard for the convenience of the occupants and the conduct of business.

3. Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.

4. Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control.

ARTICLE VII

1. Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships,

companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party.

2. Each Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources. However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party. Moreover, neither Party shall deny to transportation, communications and banking companies of the other Party the right to maintain branches and agencies to perform functions necessary for essentially international operations in which they are permitted to engage.

3. The provisions of paragraph 1 of the present Article shall not prevent either Party from prescribing special formalities in connection with the establishment of alien-controlled enterprises within its territories; but such formalities may not impair the substance of the rights set forth in said paragraph.

4. Nationals and companies of either Party, as well as enterprises controlled by such nationals and companies, shall in any event be accorded most-favored-nation treatment with reference to the matters treated in the present Article.

ARTICLE VIII

1. Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

2. Nationals of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage; but they shall be permitted to engage in professional activities therein upon compliance with the requirements regarding qualifications, residence and competence that are applicable to nationals of such other Party.

3. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to engaging in scientific, educational, religious and philanthropic activities within the territories of the other Party, and shall be accorded the right to form associations for that purpose under the laws of such other Party.

ARTICLE IX

1. Nationals and companies of either Party shall be accorded within the territories of the other Party: (a) national treatment with respect to leasing land, buildings and other immovable property appropriate to the conduct of activities in which they are permitted to engage pursuant to Articles VII and VIII and for residential purposes, and with respect to occupying and using such property; and (b) other rights in immovable property permitted by the applicable laws of the other Party.

2. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to acquiring, by purchase, lease, or otherwise, and with respect to owning and possessing, movable property of all kinds, both tangible and intangible. However, either Party may impose restrictions on alien ownership of materials dangerous from the standpoint of public safety and alien ownership of interests in enterprises carrying on the activities listed in the first sentence of paragraph 2 of Article VII, but only to the extent that this can be

done without impairing the rights and privileges secured by Article VII or by other provisions of the present Treaty.

3. Nationals and companies of either Party shall be permitted freely to dispose of property within the territories of the other Party with respect to the acquisition of which through testate or intestate succession their alienage has prevented them from receiving national treatment, and they shall be permitted a term of at least five years in which to effect such disposition.

4. Nationals and companies of either Party shall be accorded within the territories of the other Party national treatment and most-favored-nation treatment with respect to disposing of property of all kinds.

ARTICLE X

Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment with respect to obtaining and maintaining patents of invention, and with respect to rights in trade marks, trade names, trade labels and industrial property of every kind.

ARTICLE XI

1. Nationals of either Party residing within the territories of the other Party, and nationals and companies of either Party engaged in trade or other gainful pursuit or in scientific, educational, religious

or philanthropic activities within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, within the territories of such other Party, more burdensome than those borne by nationals and companies of such other Party.

2. With respect to nationals of either Party who are neither resident nor engaged in trade or other gainful pursuit within the territories of the other Party, and with respect to companies of either Party which are not engaged in trade or other gainful pursuit within the territories of the other Party, it shall be the aim of such other Party to apply in general the principle set forth in paragraph 1 of the present Article.

3. Nationals and companies of either Party shall in no case be subject, within the territories of the other Party, to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions, activities or any other object, or to requirements with respect to the levy and collection thereof, more burdensome than those borne by nationals, residents and companies of any third country.

4. In the case of companies of either Party engaged in trade or other gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other

Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories, nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories. A comparable rule shall apply also in the case of companies organized and operated exclusively for scientific, educational, religious or philanthropic purposes.

5. Each Party reserves the right to: (a) extend specific tax advantages on the basis of reciprocity; (b) accord special tax advantages by virtue of agreements for the avoidance of double taxation or the mutual protection of revenue; and (c) accord to its own nationals and to residents of contiguous countries more favorable exemptions of a personal nature with respect to income taxes and inheritance taxes than are accorded to other non-resident persons.

ARTICLE XII

1. Nationals and companies of either Party shall be accorded by the other Party national treatment and most-favored-nation treatment with respect to payments, remittances and transfers of funds or financial instruments between the territories of the two Parties as well as between the territories of such other Party and of any third country.

2. Neither Party shall impose exchange restrictions as defined in paragraph 5 of the present Article except to the extent necessary to prevent its monetary

reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves. It is understood that the provisions of the present Article do not alter the obligations either Party may have to the International Monetary Fund or preclude imposition of particular restrictions whenever the Fund specifically authorizes or requests a Party to impose such particular restrictions.

3. If either Party imposes exchange restrictions in accordance with paragraph 2 above, it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VI, paragraph 3, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investments, and capital transfers, giving consideration to special needs for other transactions. If more than one rate of exchange is in force, the rate applicable to such withdrawals shall be a rate which is specifically approved by the International Monetary Fund for such transactions or, in the absence of a rate so approved, an effective rate which, inclusive of any taxes or surcharges on exchange transfers, is just and reasonable.

4. Exchange restrictions shall not be imposed by either Party in a manner unnecessarily detrimental or arbitrarily discriminatory to the claims, investments, transport, trade, and other interests of the nationals and companies of the other Party, nor to the competitive position thereof.

5. The term "exchange restrictions" as used in the present Article includes all restrictions, regulations, charges, taxes, or other requirements imposed by either Party which burden or interfere with payments, remittances, or transfers of funds or of financial instruments between the territories of the two Parties.

ARTICLE XIII

Commercial travelers representing nationals and companies of either Party engaged in business within the territories thereof shall, upon their entry into and departure from the territories of the other Party and during their sojourn therein, be accorded most-favored-nation treatment in respect of the customs and other matters, including, subject to the exceptions in paragraph 5 of Article XI, taxes and charges applicable to them, their samples and the taking of orders, and regulations governing the exercise of their functions.

ARTICLE XIV

1. Each Party shall accord most-favored-nation treatment to products of the other Party, from whatever place and by whatever type of carrier arriving,

and to products destined for exportation to the territories of such other Party, by whatever route and by whatever type of carrier, with respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation.

2. Neither Party shall impose restrictions or prohibitions on the importation of any product of the other Party, or on the exportation of any product to the territories of the other Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

3. If either Party imposes quantitative restrictions on the importation or exportation of any product in which the other Party has an important interest:

(a) It shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any change in such amount or period; and

(b) If it makes allotments to any third country, it shall afford such other Party a share proportionate to the amount of the product, by quantity or value, supplied by or to it during a previous representative period, due

consideration being given to any special factors affecting the trade in such product.

4. Either Party may impose prohibitions or restrictions on sanitary or other customary grounds of a noncommercial nature, or in the interest of preventing deceptive or unfair practices, provided such prohibitions or restrictions do not arbitrarily discriminate against the commerce of the other Party.

5. Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to all matters relating to importation and exportation.

6. The provisions of the present Article shall not apply to advantages accorded by either Party:

(a) to products of its national fisheries;

(b) to adjacent countries in order to facilitate frontier traffic; or

(c) by virtue of a customs union or free-trade area of which it may become a member, so long as it informs the other Party of its plans and affords such other Party adequate opportunity for consultation.

7. Notwithstanding the provisions of paragraphs 2 and 3 (b) of the present Article, a Party may apply restrictions or controls on importation and exportation of goods that have effect equivalent to, or which are necessary to make effective, exchange restrictions applied pursuant to Article XII. However,

such restrictions or controls shall depart no more than necessary from the aforesaid paragraphs and shall be conformable with a policy designed to promote the maximum development of nondiscriminatory foreign trade and to expedite the attainment both of a balance-of-payments position and of monetary reserves which will obviate the necessity of such restrictions.

ARTICLE XV

1. Each Party shall promptly publish laws, regulations and administrative rulings of general application pertaining to rates of duty, taxes or other charges, to the classification of articles for customs purposes, and to requirements or restrictions on imports and exports or the transfer of payments therefor, or affecting their sale, distribution or use; and shall administer such laws, regulations and rulings in a uniform, impartial and reasonable manner. As a general practice, new administrative requirements or restrictions affecting imports, with the exception of those imposed on sanitary grounds or for reasons of public safety, shall not go into effect before the expiration of 30 days after publication, or alternatively, shall not apply to products en route at time of publication.

2. Each Party shall provide an appeals procedure under which nationals and companies of the other Party, and importers of products of such other Party, shall be able to obtain prompt and impartial review, and correction when warranted, of administrative

action relating to customs matters, including the imposition of fines and penalties, confiscations, and rulings on questions of customs classification and valuation by the administrative authorities. Penalties imposed for infractions of the customs and shipping laws and regulations concerning documentation shall, in cases resulting from clerical errors or when good faith can be demonstrated, be no greater than necessary to serve merely as a warning.

3. Neither Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either Party. The present paragraph is subject to the provisions of Article XII.

ARTICLE XVI

1. Products of either Party shall be accorded, within the territories of the other Party, national treatment and most-favored-nation treatment in all matters affecting internal taxation, sale, distribution, storage and use.

2. Articles produced by nationals and companies of either Party within the territories of the other Party, or by companies of the latter Party controlled by such nationals and companies, shall be accorded therein treatment no less favorable than that accorded to like articles of national origin by whatever person or company produced, in all matters affecting exportation, taxation, sale, distribution, storage and use.

ARTICLE XVII

1. Each Party undertakes (a) that enterprises owned or controlled by its Government, and that monopolies or agencies granted exclusive or special privileges within its territories, shall make their purchases and sales involving either imports or exports affecting the commerce of the other Party solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale; and (b) that the nationals, companies and commerce of such other Party shall be afforded adequate opportunity, in accordance with customary business practice, to compete for participation in such purchases and sales.

2. Each Party shall accord to the nationals, companies and commerce of the other Party fair and equitable treatment, as compared with that accorded to the nationals, companies and commerce of any third country, with respect to: (a) the governmental purchase of supplies, (b) the awarding of concessions and other government contracts, and (c) the sale of any service sold by the Government or by any monopoly or agency granted exclusive or special privileges.

ARTICLE XVIII

1. The two Parties agree that business practices which restrain competition, limit access to markets or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises or by combination, agreement

or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practices and to take such measures as it deems appropriate with a view to eliminating such harmful effects.

2. No enterprise of either Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein.

ARTICLE XIX

1. Between the territories of the two Parties there shall be freedom of commerce and navigation.

2. Vessels under the flag of either Party, and carrying the papers required by its law in proof of nationality, shall be deemed to be vessels of that Party both on the high seas and within the ports, places and waters of the other Party.

3. Vessels of either Party shall have liberty, on equal terms with vessels of the other Party and on equal terms with vessels of any third country, to come with their cargoes to all ports, places and waters of

such other Party open to foreign commerce and navigation. Such vessels and cargoes shall in all respects be accorded national treatment and most-favored-nation treatment within the ports, places and waters of such other Party.

4. Vessels of either Party shall be accorded national treatment and most-favored-nation treatment by the other Party with respect to the right to carry all products that may be carried by vessel to or from the territories of such other Party; and such products shall be accorded treatment no less favorable than that accorded to like products carried in vessels of such other Party, with respect to: (a) duties and charges of all kinds, (b) the administration of the customs, and (c) bounties, drawbacks and other privileges of this nature.

5. Vessels of either Party, in case of shipwreck, stranding, or of being forced to put into the ports, places and waters of the other Party, whether or not open to foreign commerce and navigation, shall enjoy the same assistance and protection as are in like cases enjoyed by vessels of such other Party or of any third country, and shall not be subject to any duties or charges other than those which would be payable in like circumstances by vessels of such other Party or of any third country. The cargoes of such vessels of either Party and all articles salvaged from them shall be exempt from customs duties unless entered for consumption within the territories of the other Party; but articles not entered for consumption may be

subject to measures for the protection of the revenue pending their exit from the country.

6. Notwithstanding any other provision of the present Treaty, each Party may reserve exclusive rights and privileges to its own vessels with respect to the coasting trade, national fisheries and inland navigation, or may admit foreign vessels thereto only on a reciprocity basis.

7. The term "vessels", as used herein, means all types of vessels, whether privately owned or operated, or publicly owned or operated; but this term does not, except with reference to paragraphs 2 and 5 of the present Article, include fishing vessels or vessels of war.

ARTICLE XX

There shall be freedom of transit through the territories of each Party by the routes most convenient for international transit:

(a) for nationals of the other Party, together with their baggage;

(b) for other persons, together with their baggage, en route to or from the territories of such other Party; and

(c) for products of any origin en route to or from the territories of such other Party.

Such persons and things in transit shall be exempt from customs duties, from duties imposed by reason of transit, and from unreasonable charges and

requirements; and shall be free from unnecessary delays and restrictions. They shall, however, be subject to measures referred to in paragraph 3 of Article I, and to nondiscriminatory regulations necessary to prevent abuse of the transit privilege.

ARTICLE XXI

1. The present Treaty shall not preclude the application of measures:

(a) regulating the importation or exportation of gold or silver;

(b) relating to fissionable materials, to radioactive by-products of the utilization or processing thereof, or to materials that are the source of fissionable materials;

(c) regulating the production of or traffic in arms, ammunition and implements of war, or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment;

(d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests; and

(e) denying to any company in the ownership or direction of which nationals of any third country or countries have directly or indirectly the controlling

interest, the advantages of the present Treaty, except with respect to recognition of juridical status and with respect to access to courts of justice and to administrative tribunals and agencies.

2. The most-favored-nation provisions of the present Treaty relating to the treatment of goods shall not apply to advantages accorded by the United States of America or its Territories and possessions to one another, to the Republic of Cuba, to the Republic of the Philippines, to the Trust Territory of the Pacific Islands or to the Panama Canal Zone.

3. The provisions of the present Treaty relating to the treatment of goods shall not preclude action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade[1] during such time as such Party is a contracting party to the General Agreement. Moreover, either Party may withhold advantages negotiated under the aforesaid Agreement from those countries which by their own choice are not contracting parties thereto.

4. Nationals of either Party admitted into the territories of the other Party for limited purposes shall not enjoy rights to engage in gainful occupations in contravention of limitations expressly imposed, according to law, as a condition of their admittance.

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[1] Treaties and Other International Acts Series 1700; 61 Stat., pts. 5 and 6.

5. Nothing in the present Treaty shall be deemed to grant or imply any right to engage in political activities.

ARTICLE XXII

1. The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party.

2. The term "most-favored-nation treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of any third country.

3. As used in the present Treaty, the term "companies" means corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit. Companies constituted under the applicable laws and regulations within the territories of either Party shall be deemed companies thereof and shall have their juridical status recognized within the territories of the other Party.

4. National treatment accorded under the provisions of the present Treaty to companies of Japan shall, in any State, Territory or possession of the United States of America, be the treatment

accorded therein to companies created or organized in other States, Territories, and possessions of the United States of America.

ARTICLE XXIII

The territories to which the present Treaty extends shall comprise all areas of land and water under the sovereignty or authority of each Party, other than the Panama Canal Zone and the Trust Territory of the Pacific Islands, except to the extent that the President of the United States of America shall by proclamation extend provisions of the Treaty to such Trust Territory.

ARTICLE XXIV

1. Each Party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as the other Party may make with respect to any matter affecting the operation of the present Treaty.

2. Any dispute between the Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the Parties agree to settlement by some other pacific means.

ARTICLE XXV

1. The present Treaty shall be ratified, and the ratifications thereof shall be exchanged at Washington as soon as possible.

2. The present Treaty shall enter into force one month after the day of exchange of ratifications. It shall remain in force for ten years and shall continue in force thereafter until terminated as provided herein.

3. Either Party may, by giving one year's written notice to the other Party, terminate the present Treaty at the end of the initial ten-year period or at any time thereafter.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Japanese languages, both equally authentic, at Tokyo, this second day of April, one thousand nine hundred fifty three.

PROTOCOL

At the time of signing the Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, the undersigned Plenipotentiaries, duly authorized by their respective Governments, have further agreed on the following provisions, which shall be considered integral parts of the aforesaid Treaty:

1. The term "access to the courts of justice and to administrative tribunals and agencies" as used in Article IV, paragraph 1, comprehends, among other things, legal aid and security for costs and judgment.

2. The provisions of Article VI, paragraph 3, providing for the payment of compensation shall extend to interests held directly or indirectly by nationals and companies of either Party in property which is taken within the territories of the other Party.

3. The term "public utility enterprises" as used in Article VII, paragraph 2, is deemed to include enterprises engaged in furnishing communications services, water supplies, transportation by bus, truck or rail, or in manufacturing and distributing gas or electricity, to the general public.

4. With reference to Article VII, paragraph 4, either Party may require that rights to engage in mining shall be dependent on reciprocity. Furthermore, Japan shall not be obliged by the terms of that paragraph to accord to enterprises of nationals and companies of the United States of the types mentioned in the first sentence of paragraph 2 of Article VII more favorable treatment than that accorded by the State or Territory of the United States of America in which such national is domiciled, or pursuant to the laws of which such company is organized, or in which, if such company is organized under Federal law, such company has its principal office, to the enterprises of nationals and companies of Japan.

5. The provisions of Article VIII, paragraph 2, shall not extend to the professions of notary public and port pilot.

6. Either Party may impose restrictions on the introduction of foreign capital as may be necessary to protect its monetary reserves as provided in Article XII, paragraph 2.

7. With reference to Article XIV, paragraph 4, it is understood that either Party, acting in accordance with its laws, may prohibit the importation into its territory, or seize, or otherwise restrict or regulate the sale of any goods with respect to which there has been failure to comply with marking requirements established to assure that the true geographic or commercial origin of such goods is correctly represented. Furthermore, each Party agrees to take appropriate steps to prevent misrepresentations, direct or indirect, that goods produced or sold in or exported from its territory originate within the territory of the other Party or any distinctive place within such territory.

8. During periods of emergency resulting in reduced availabilities of industrial raw materials and basic foodstuffs, the provisions of Article XVI, paragraph 1, of the present Treaty shall not prevent the application by either Party of needed controls over the internal sale, distribution or use of imported articles of categories which may be in short supply, other than or different from controls applied with respect to like articles of national origin. If imposed, such controls shall be applied by either Party in such a manner as to minimize injury to the competitive position within its territories of the commerce of the

other Party, and shall be continued no longer than required by the supply situation.

9. Notwithstanding the national treatment provisions of Article XVI, paragraph 1, a Party may maintain screen quota regulations that require the exhibition of cinematograph films of national origin during a specified minimum portion of the screen time actually utilized by exhibitors for the commercial exhibition of all films. Screen quotas shall be computed on the basis of screen time per theatre per year or the equivalent thereof, and shall be subject to consultation.

10. It is understood that for the purposes of Article XVII, paragraph 1, availability of means of payment is considered to be a commercial consideration.

11. The provisions of Article XVII, paragraph 2 (b) and (c), and of Article XIX, paragraph 4, shall not apply to postal services.

12. The provisions of Article XXI, paragraph 2, shall apply in the case of Puerto Rico regardless of any change that may take place in its political status.

13. Article XXIII does not apply to territories under the authority of either Party solely as a military base or by reason of temporary military occupation, or to Nansei Shoto south of 29 degrees north latitude (including the Ryukyu Islands and the Daito Islands), Nanpo Shoto south of Sofu Gan (including the Bonin Islands, Rosario Island and the Volcano

Islands) and Parece Vela and Marcus Island, the status of which is provided for in Article 3 of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951.[1]

14. The most-favored-nation treatment provisions of the present Treaty shall not apply with respect to those rights and privileges which may be accorded by Japan to: (a) persons who originated in the territories to which all right, title and claim were renounced by Japan in accordance with Article 2 of the Treaty of Peace with Japan signed at San Francisco on September 8, 1951; or (b) the native inhabitants and vessels of, and trade with, the islands mentioned in Article 3 of the said Treaty of Peace.

15. During a transitional period of three years from the date of the coming into force of the present Treaty, Japan may continue to apply existing restrictions on the purchase by aliens, with yen, of outstanding shares in Japanese enterprises.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed this Protocol and have affixed hereunto their seals.

DONE in duplicate, in the English and Japanese languages, both equally authentic, at Tokyo, this second day of April, one thousand nine hundred fifty three.

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[1] Treaties and Other International Acts Series 2490; 3 UST, pt. 3, p. 3169.

[FOREIGN LANGUAGE TEXT OMITTED]

WHEREAS the Senate of the United States of America by their resolution of July 21, 1953, two-thirds of the Senators present concurring therein, did advise and consent to the ratification of the aforesaid treaty and protocol subject to a reservation as follows:

> "Article VIII, paragraph 2, shall not extend to professions which, because they involve the performance of functions in a public capacity or in the interest of public health and safety, are state-licensed and reserved by statute or constitution exclusively to citizens of the country, and no most-favored-nation clause in the said treaty shall apply to such professions.";

WHEREAS, by an exchange of notes signed at Tokyo on August 29, 1953, the aforesaid reservation was communicated by the Government of the United States of America to the Government of Japan and was accepted by the Government of Japan;

WHEREAS the aforesaid treaty and protocol were ratified by the President of the United States of America on September 15, 1953, in pursuance of the aforesaid advice and consent of the Senate and subject to the aforesaid reservation;

WHEREAS, by an exchange of notes signed at Tokyo on August 29, 1953, the Government of Japan communicated to the Government of the United States of America, and the Government of the United

States of America accepted, a reservation reading in translation as follows:

> "Japan reserves the right to impose prohibitions or restrictions on nationals of the United States of America with respect to practicing the professions referred to in Article VIII, paragraph 2, to the same extent as States, Territories or possessions of the United States of America, including the District of Columbia, to which such nationals belong impose prohibitions or restrictions on nationals of Japan with respect to practicing such professions.";

WHEREAS the aforesaid treaty, the provisions of the aforesaid protocol being considered integral parts thereof, was ratified on the part of the Government of Japan on September 2, 1953, subject to the reservation last recited hereinbefore;

WHEREAS the respective instruments of ratification, as aforesaid, were exchanged at Washington on September 30, 1953, and a protocol of exchange, in the English and Japanese languages, was signed at that place and on that date by the respective Plenipotentiaries of the United States of America and Japan, the said protocol of exchange indicating that the aforesaid reservations had been made and accepted;

AND WHEREAS it is provided in Article XXV of the aforesaid treaty that the treaty shall enter into force one month after the day of exchange of ratifications, and it is provided in the aforesaid protocol that

the provisions thereof shall be considered integral parts of the aforesaid treaty;

NOW, THEREFORE, be it known that I, Dwight D. Eisenhower, President of the United States of America, do hereby proclaim and make public the aforesaid treaty and the aforesaid protocol to the end that the same and every article and clause thereof may be observed and fulfilled in good faith on and after October 30, 1953, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof, subject to the aforesaid reservations.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fourth day of November in the year of our Lord one thousand nine hundred fifty-three and of the Independence of the United States of America the one hundred seventy-eighth.

SIGNATORIES:

FOR THE UNITED STATES OF AMERICA:

ROBERT MURPHY

[SEAL]

FOR JAPAN:

KATSUO OKAZAKI

[SEAL]

[FOREIGN LANGUAGE TEXT OMITTED]

[SEAL]

DWIGHT D EISENHOWER

By the President:

JOHN FOSTER DULLES

Secretary of State